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97-2039

No._____

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

ALAN HAVIGHURST AND DOUGLAS HAVIGHURST,
Petitioners

v.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER HAVIGHURST,
Respondent

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Butler County

---

PETITION FOR A WRIT OF CERTIORARI

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166 pp

QUESTIONS PRESENTED

I.

WHERE ONE STATE STATUTE CONFERS CONCURRENT JURISDICTION ON TWO CO-EQUAL STATE COURTS REGARDING THE SUBJECT MATTER OF CHARITABLE TRUSTS, AND A JURY TRIAL IS MANDATORY WHERE DEMANDED IN ONE COURT ACCORDING TO A SECOND STATUTE BUT IS DISCRETIONARY WHERE DEMANDED IN THE CO-EQUAL COURT ACCORDING TO A THIRD STATUTE, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHERE CITIZENS OF THE UNITED STATES ARE DENIED A JURY TRIAL FOR THE ADJUDICATION OF THEIR RIGHTS TO SPECIFIC PERSONAL PROPERTY AND MONEY.

II.

WHETHER A STATE TRIAL COURT'S EXTINGUISHING *IPSE DIXIT* OF THE REVERSIONARY INTERESTS OF HEIRS AT LAW WITH RESPECT TO A CHARITABLE TRUST INTENDED TO PROMOTE INTERNATIONAL UNDERSTANDING BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS IS A TAKING WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

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Helen Havighurst Berk

Dorothy Havighurst Kucera

Miriam Havighurst Johnson

James P. Havighurst

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IN THE SUPREME COURT OF THE UNITED STATES
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Petition for A Writ of Certiorari To
The Court of Appeals
Of Ohio, Butler County

Alan Havighurst and Douglas Havighurst respectfully petition for a writ of certiorari to the Court of Appeals of Ohio, Butler County in this case.

OPINIONS BELOW

The opinion of the Twelfth District Court of Appeals of Ohio, Butler County, a copy of which appears in Appendix A, *infra*, to this Petition (at 3a-25a), is unreported.

JURISDICTION

The Twelfth District Court of Appeals of Ohio, Butler County, entered its judgment on June 2, 1997 (App. A, 26a-27a). A motion to certify the record to the Ohio Supreme Court was denied October 1, 1997. This entry is attached at Appendix C-1. A Motion for Reconsideration to the Ohio Supreme Court was denied November 12, 1997 and is attached at Appendix C (93a).

The jurisdiction of the Supreme Court of the United States is based on 28 U.S.C. Sec. 1257. This provision is invoked because the case involves a final judgment rendered by the highest court in which a decision could be had and the case is one in which an important question of federal constitutional law has not been, but should be, settled by this Court.

CONSTITUTION AND STATUTES INVOLVED

This case involves the Equal Protection Clause of Amendment XIV of the United States Constitution, and the "Takings" Clause of Amendment V of the United States Constitution (as made applicable to the states through the Due Process Clause of Amendment XIV). These provisions are set out at Appendix D, *infra* (at 96a).

As well, Ohio statutes are at issue. These statutes, Ohio Revised Code Sections 2101.24(B), 2101.31, and 2311.04, are set out in pertinent part at Appendix D (at 97a-98a).

STATEMENT

This case concerns the viability and continuing existence of a private testamentary charitable trust designed for the purpose of "building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics" through the funding of projects specified in the testamentary instrument. (These provisions are produced in their entirety at *App. E, 102a-103a.*) Walter Havighurst, the testator and author of novels and historical works,

executed his Last Will and Testament on September 7, 1988 and added a codicil October 11, 1989. In December 1991 representatives of the Russian Federation, Belarus, and the Ukraine acknowledged in the Brest Declaration that the Soviet Union could no longer be viewed as a political entity according to international law. On February 3, 1994, Walter Havighurst died at the age of 92 without having re-addressed the plan for his estate subsequent to the demise of the Soviet Union.

Testator left an estate valued at approximately $6.2 million according to the estate's Inventory, consisting of approximately $6,000,000 in personal property and cash with the balance in real property (*App. E, 104a-106a*). The testator did not provide for a successor plan if the trust could not be carried out, and the Trustee of the putative charitable trust, The First National Bank of Southwestern Ohio, was not granted any authority to act outside the express terms of the trust or to change any terms in the instrument in the event of unforeseen contingencies (such as the fall of the Soviet Union). The President of Miami University was designated by the Testator as an advisor to the Trustee regarding funding of the designated projects. The instrumentality for carrying out the projects was stated to be "The Miami University International Center, Oxford, Ohio", an entity which Miami University admitted had no legal existence under Ohio law in interrogatories propounded during the discovery process.

The First National Bank of South-western Ohio, Executor of the Estate of

Walter Havighurst, commenced this declaratory judgment action in the Probate Division of the Common Pleas Court of Butler County, Ohio on October 20, 1994. The Executor alleged, and sought judicial confirmation of, *inter alia*, the following: (1) that "the terms of the charitable trust as set out in the Will create no reversionary interests in the heirs of testator" (*App. E, 115a, para. 12*); (2) "that the trustee would be authorized by the terms of the Will to provide funding for programs related to the USSR as it previously existed ... and for programs related to people or institutions previously or currently located within the areas formerly occupied by the Soviet Union." (*App.E, 116a, para. D of prayer for relief*); and (3) that Miami University, a state institution, "is the beneficiary of the charitable trust". (*App. E, 115a, para.11*)

Ten heirs at law of decedent, the Ohio Attorney General, Miami University, and two miscellaneous parties were joined as Defendants. Petitioners Douglas Havighurst and Alan Havighurst filed separate but substantially identical Answers and Counter-claims. These responses controverted certain allegations set forth in the Complaint (including, *inter alia*, that Miami University was the sole beneficiary of the trust), demanded trial by jury on all issues so triable, and asked that the putative

trust be declared invalid given the demise of the Soviet Union and the apparent impossibility of carrying out the trust as written. Given such circumstances, petitioners asked that the property comprising the trust's corpus pass according to the Ohio statute of descent and distribution (Ohio Revised Code Section 2105.06, *App.D, 100a*).

The Ohio Attorney General answered by denying for want of knowledge that "Miami University" was the beneficiary of the trust. Miami University, through an attorney acting as "Special Counsel to the Ohio Attorney General", filed a pleading that stated it "echoed" the Plaintiff's allegations.

Petitioners endorsed upon their Answers and Counterclaims demands for a jury trial, and the matter was set down for trial by jury in the Probate Division of the Common Pleas Court of Butler County, Ohio. Thereafter, the Executor filed a motion to strike the jury demands and, after oral arguments on the issue, the motion to strike was granted by the probate judge. (*App. B, 32a-34a*) In addition, the Executor filed a motion for summary judgment with respect to which Petitioners filed memoranda in opposition. After oral argument, the motion for summary judgment was overruled (*App. B, 35a-38a*).

The matter proceeded to a two-day trial on the merits, with the probate judge hearing the case without a jury. Issues tried included: (1) the existence of the Soviet Union; (2) the political continuity between what was the Union of Soviet Socialist Republics from 1917-1991 and what the region had become as of the date of trial; (3) the

Testator's intent for the proposed charitable trust; (4) whether the charitable intent was general or specific; (5) whether the proposed plan could reasonably be carried out according to its terms given the fragmentation of the Soviet Union into fifteen separate political, economic, and social units; (6) whether the end of the Cold War rendered the plan a nullity; and (7) the applicability of the *cy pres* doctrine and deviation doctrines.

The Executor and Miami University shared an expert witness, Paul Goble, an international affairs consultant; the Petitioners' expert was Dr. Heather Hogan, Professor of History and Soviet Studies at Oberlin College, Oberlin, Ohio. These two expert witnesses testified about the events which had sundered the Soviet Union, the current political and economic condition of the political entities which had formerly made up the Soviet Union, and the meaning of certain words and terms of art in the testamentary instrument. The experts agreed that the Union of Soviet Socialist Republics ceased to exist by the end of 1991, that the Cold War as had existed since the 1940's was over, and that where there had been the Union of Soviet Socialist Republics, there were now fifteen "republics", with some participating in a loose confederation for mutual debate and planning called the Commonwealth of Independent States. There was disagreement on other issues.

Five and a half months after the trial, the court handed down its "Findings of Fact and Conclusions of Law." Specifically, thirty (30) Findings of Fact and twenty-four (24) Conclusions of Law were delivered. The

court variously assigned four issues to both categories. (See Chart comparing court's treatment of these four issues at *App. E, 118a-120a*) The probate court judge decreed that the proposed trust could be carried out as written, that Miami University was a beneficiary of the trust, and that it was a valid charitable trust under the laws of Ohio. The trial court said that Walter Havighurst intended to promote a program between "peoples of the Soviet Union and the United States" meaning ethnic groups (rather than political entities); that the nonexistence of the Soviet Union as a political entity "is of no importance in carrying out the terms of the charitable trust" (*Find. of Fact No. 29, App. 79a, Conc. Of Law No.13, App. 82a*); that "the continued existence of the Soviet Union was not intended by the testator to be an integral factor in testator's over-all plan." (*Conc. of Law No. 13, App. 82a, Find. of Fact No. 26, App. 79a*). The Court issued three orders which were journalized December 15, 1995, February 20, 1996, and February 21, 1996 (*App. A, 3a-28a*). These orders dismissed Petitioners' counterclaims and ordered the funding of the charitable trust to proceed consistent with the decision.

Petitioners filed Notices of Appeal to the Twelfth District Court of Appeals of Ohio, Butler County, and briefs to such court followed. The judges of the Twelfth District recused themselves, and the case was sent by Ohio Supreme Court Chief Justice Thomas Moyer to a panel comprised of three appellate judges who normally sit on the First Appellate District. Oral argument was conducted November 22, 1996. The Court's

Opinion and Judgment Entries were issued on June 2 and 16, 1997 (*App. A, 3a-28a*). Petitioners filed a Motion to Certify to the Ohio Supreme Court on July 15, 1997, which was denied, with Chief Justice Moyer dissenting (*App. C, 93a*). A Motion for Rehearing was filed with the Ohio Supreme Court on October 14, 1997 and denied on November 12, 1997, with Chief Justice Moyer dissenting (*App. C, 94a*).

How Petitioners Raised Federal Questions Below

(First Question Presented For Review)

Petitioners each made jury demands on the face of their Answers and Counterclaims. The original trial judge in this case, Judge Stephen Powell, after a hearing, set the matter down for a jury trial (*App. B, 30a-31a*). Thereafter, upon the assignment of this matter to Probate Division Judge Randy Rogers the Executor filed a Motion to Strike the Jury Demands, which motion was granted by means of an "Opinion and Entry Denying Demands for Jury" issued by Judge Rogers. (*App. B, 32a-34a*). Federal Seventh and Fourteenth Amendment issues and Ohio constitutional issues regarding the jury issue were raised by Petitioners. Before the Court of Appeals, Petitioners appealed the trial court's order setting out the denial of the jury as a separate assignment of error, citing the Equal Protection and Due Process Clauses of the United States Constitution, as noted by the Court of Appeals in its Opinion (*App.A, 14a-17a*).

Upon affirmance of the trial court by the Court of Appeals, Petitioners raised the federal issues regarding the right to jury

trial including equal protection and due process under the United States Constitution in a pleadings to the Ohio Supreme Court seeking its review of this case (*App. D, 124a-127a*).

(Second Question Presented for Review)

In their Answers and Counterclaims, Petitioners each denied the allegation set forth in the Executor's Complaint regarding the non-existence of any "reversionary interest" inuring to "any heirs of the Donor." (*Compl., App. E, 115a, para.12*) At the trial stage, Petitioners asserted the right to present and future property interests regarding the matter under litigation pursuant to federal constitutional law and Ohio law indicating that such property could not be taken from the heirs at law without just compensation. Having received an adverse ruling from the trial court, Petitioners appealed to the Twelfth District Court of Appeals of Ohio, Butler County, on the basis that the trial court, by entering the orders which it did, effected a non-compensated "taking" of the heirs' rights in reversion without just compensation, violated the Fifth and Fourteenth Amendments to the United States Constitution, and failed to adhere to applicable state law. (*App. E, 122a*).

After an adverse ruling by the Court of Appeals, Petitioners filed a Motion seeking review by the Ohio Supreme Court, raising the Fifth and Fourteenth Amendments to the United States Constitution as grounds for hearing the "takings" issue. (*App. E, 124a*) The same federal issues were raised in the Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Determine Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution Requires A Jury Trial Upon Timely Demand Under Circumstances Where State Statutory Provisions Are In Conflict and Fundamental Rights Are at Stake.

The Court should hear this matter to discern how loosely related state statutes coming to bear on a single subject may work to deny citizens of the United States the equal protection of the law. Facially neutral statutes were used here in abrogation of constitutional principles to reach a result inconsistent with the statute mandating a jury. The Ohio Legislature has set forth conditions for a jury trial in a civil proceeding. With that being the case, Petitioners assert that Ohio courts must observe federal constitutional principles when deciding whether a jury trial is mandatory. Here, the Equal Protection Clause of the Fourteenth Amendment is violated where the right to jury in civil cases is explicitly guaranteed by statute, but is disavowed in this specific case by a state court's errant ruling.

Petitioners assert that the United States Constitution has been violated because Ohio lawmakers enacted conflicting statutes on a matter affecting fundamental rights, thus setting the stage for the kind of "invidious discrimination, the wholly arbitrary act, which cannot stand

consistently with the Fourteenth Amendment." *City of New Orleans v. Dukes*, 427 U.S. 297, at 303-304 (1976). Such discrimination occurs when state courts *apply* statutes which implicate fundamental personal rights and privileges of citizenship, and they are applied in such a way that the fundamental rights guaranteed by statutes are disavowed as to *some* litigants but not *all* litigants. The result of this mischief can be stated thus: He who loses the race to the courthouse loses the choice of forum. Having lost the choice of forum, such litigant loses the right to a jury.

The Ohio statutes in question (which are set forth at Appendix D, *infra*, at 97a-98a) address the jurisdiction of Common Pleas Courts - Probate Divisions and Common Pleas Courts - General Divisions in matters involving charitable trusts, and the right to jury trial in civil cases. Paragraph 7 of the Executor's Complaint (*App. E, 114a*) identified Ohio Revised Code Section 2101.24 as the statutory basis for the trial court's jurisdiction. An examination of that statute and more particularly of subdivision (B)(1)(b) thereof reveals that it expressly establishes <u>concurrent</u> jurisdiction in Ohio Common Pleas Courts-<u>Probate</u> Divisions and Common Pleas Courts-<u>General</u> Divisions for matters involving charitable trusts. Further, Ohio Revised Code Section 2101.31 states that in Probate Court, the probate judge shall have <u>discretion</u> as to whether questions of fact shall be tried to a jury. However, Ohio Revised Code Section 2311.04 states that a jury is <u>mandatory</u> in actions in Common Pleas Courts where — as here — <u>questions of fact</u> needed to be determined and

where money or the recovery of personal property is sought. Here, Petitioners asserted their rights to jury trial and to the recovery of money and specific personal property on the theory that the putative testamentary charitable trust had failed *ab initio*, but the case had already been filed in Common Pleas Court-Probate Division.

Ohio Revised Code Section 2311.04 would have mandated a jury for issues of fact in Common Pleas-General Division where this case could have been originally filed. While the denial of jury in Probate Court for issues of fact was ostensibly in the discretion of the judge according to Ohio Revised Code Section 2101.31, it here worked to deny Petitioners the right to a jury trial in violation of the equal protection clause since there were factual issues in need of resolution and Ohio Revised Code Section 2311.04 mandates a jury in the co-equal court of concurrent jurisdiction. That Probate Courts and General Division Courts are co-equals is established by the court system's enabling provision, Ohio Constitution Article IV, Sec. IV(C), and provisions contained in Ohio Revised Code Section 2101.32 and 2101.24(B)(2) (*App. D, infra, 99a-100a*).

The estate was one in which the heirs, at the moment of testator's death, held recognized interests. The Executor prepared and filed a document to fulfill statutory requirements on which the testator's "next of kin" were listed as survivors "who are or would be entitled to inherit under the statutes of descent and distribution" (App. E, 107a-109a); the property was valued at $6.3 million in the estate's opening inventory (*App. E, 104a-106a*). After taxes,

expenses, bequests, and a devise or real property, the value of the estate stood at approximately $4.5 million in December 1995. Clearly, the heirs' interests were not *de minimis*. Here, Ohio Revised Code Section 2101.31 allowing probate courts to exercise discretion regarding the granting of a jury trial cannot be allowed to trump the right to jury trial set out in Ohio Revised Code Section 2311.04. Federal constitutional principles must here prevail to prevent such a result.

Once set out by state statute, a right enacted legislatively for jury trial with regard to property interests of citizens is a fundamental right. The heirs of Walter E. Havighurst had basic civil rights at stake at the moment of the institution of this lawsuit:

> "That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government, 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries 138-140."

Lynch v. Household Finance Corp., 405 U.S. 538, 551 (1972).

Further, this Court articulated the core principle as follows:

> "[e]quality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an essential precondition to the

> realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

Id., 405 U.S. at 544, quoting *Shelley v. Kraemer*, 331 U.S. 1, 10 (1948).

Thus, the right to a jury trial to weigh evidence and to resolve competing claims regarding the substantial property interests at stake here from the Petitioners' Petitioners' perspective must, based on Ohio law and constitutional principles, be found to merit classification as a "substantial" right. As such, a "compelling state interest" analysis must be undertaken - that is, it must be demonstrated such disparate treatment with regard to fundamental rights is somehow necessary to achieve a compelling governmental purpose. That was not even attempted, much less achieved here.

As the Sixth Circuit Court of Appeals noted in *Pratt v. National Distillers & Chemical Corp.*, 853 F. 2d 1329, 1335-36 (6th Cir. 1988), *reh'g. & reh'g. en banc denied*, 1988: "The right to a jury trial under Ohio law has been held to be a *fundamental*, substantial right and not merely a question of procedure." (emphasis added), citing *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 283-84, 188 N.E. 1, 3 (1933). A right to a jury trial, is a bedrock privilege traditionally subject to zealous protection:

> "[T]he right to a jury trial does not involve merely a question of procedure. The right to a jury trial derives from Magna Carta. It is reasserted both in the Constitution of the United States

> and the Constitution of the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right. . . ."

Cleveland Ry. Co v. Halliday, *supra*, 127 Ohio St. 278 at 283-84, 188 N.E. at 3 (rule of civil court allowing six jurors to be empanelled in a civil case instead of twelve declared invalid on the basis of the above-quoted language).

If the very same action had been brought in the general division of the same Ohio court a different result as to jury trial obtains; mandatory status would obtain as to a jury demand in an Ohio Common Pleas Court-*General* Division. This is disparate treatment of similarly situated citizens with regard to a fundamental right for which no justification by the State of Ohio has been advanced. As this Court stated in *Yick Wo v. Hopkins*, 118 U.S. 350, 373-74 (1886):

> "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice, is still within the prohibitions of the Constitution."

The Equal Protection Clause of the Fourteenth Amendment protects against state action, and the protection extends to "the

action of state courts and judicial officers in their official capacities." *Shelley v. Kraemer, supra,* 334 U.S. at 14. As is, the Ohio General Assembly's broad intention that all cases with issues of fact involving the recovery of specific personal property or money be accorded a jury trial is thwarted if it is not applied to the situation of charitable trusts, which the selfsame General Assembly has stated can be filed in either General Division or Probate Division of Ohio Common Pleas Courts. Where jury trial is extended by statute but then, as here, denied judicially in any particular instance, equal protection of the laws is abridged.

The Equal Protection violation is particularly egregious here where the proceeding involved is an estate administration controlled by statutes of the state's own devising. Moreover, the Ohio Attorney General and Miami University, an instrumentality of the State of Ohio (for authorities supporting this proposition, see *infra* at pp.26-27), took positions contrary to Petitioners in this case. Where construction of ambiguous language should be made in favor of the interests of the citizenry, such language was instead construed narrowly in favor of the State, which was responsible for drafting the disputed statutory language. This is in conflict with common law principles of statutory construction, as well as contrary to underlying equitable principles.

Jury trials are not strangers to Probate Division courts in Ohio. Ohio statutes mandate jury trial where demanded in will contests, ante mortem determinations of validity, and land appropriation proceedings

(Ohio Revised Code Sections 2107.72, 2107.081, and 163.09 *et seq.*, respectively). These actions are all tried exclusively in Probate Division Courts. As well, the probate judge has discretion to empanel a jury in any case where there are questions of fact (Ohio Revised Code Section 2101.31). Petitioners submit that in the instant case the striking of the jury demand was violative of the equal protection clause. Thus, in this case a jury was constitutionally mandated given Ohio Revised Code Section 2311.04 and the related statutes.

Ohio case law demonstrates these principles clearly. Ohio Revised Code Section 2311.04, which mandates jury trials in Ohio Common Pleas Courts where money or specific personal property is sought, has been scrupulously followed in cases where fact finding is required. Reversible error was found when a trial court denied a trial by jury where issues of fact existed in a declaratory judgment action in *Solon Chamber of Commerce v. Women's Gen. Hosp.*, 81 Ohio App. 3d 687, 612 N.E.2d 331 (Cuyahoga Cty. App., 1992, *motion to certify over'd.*, 65 Ohio St. 3d 1458, 602 N.E.2d 254 (1992). And see: *Harleysville Mut. Ins. Co. v. Santora*, 3 Ohio App. 3d 257, 444 N.E. 2d 1076 (Cuyahoga Cty. App., 1982); *Brite Metal Treating v. Reserve Iron and Metal, Inc.*, 61 Ohio App. 3d 206, 572 N.E. 2d 703 (Cuyahoga Cty. App., 1988) (the court held that a Common Pleas Court-General Division judge acted inappropriately when he made factual findings that properly should have been determined by a jury, even if invoking so-called equitable powers, and case was reversed and remanded); *cf. Lewis v. Motorists Ins. Co.*, 96 Ohio App.

3d 575, 645 N.E. 2d 784 at 791-792 (Cuyahoga County, 1994) (in declaratory judgment action for damages, court stated "notwithstanding the fact that the trial court bifurcated the declaratory issue from the issue of damages, this action is one for the recovery of money.")

That charitable trust cases can be tried and have been tried in Common Pleas-General Division in Ohio cannot be doubted. See: *DeMar v. Mosely*, 63 Ohio Misc. 2d 102, 619 N.E. 2d 1239 (Highland Cty. Common Pleas, Probate Div., 1993). However, no Ohio cases reconciling the equal protection clause and jury issues involving the concurrent jurisdiction of probate division and general division courts of Ohio has been ruled on conclusively on either the state or federal level. In the matter *sub judice*, while the Court of Appeals analyzed the claimed denial of equal protection from the perspective of Ohio law, the panel limited its consideration of the federal constitutional constructs to a footnote (*App. A, 16a, note 2*).

This case was suffused with issues of fact for resolution before judgment. The issues ranged, in the words of the trial judge, from the existence of "the Union of Soviet Socialist Republics"; who, or what, was denoted at the time of the 1994 trial by the phrase "peoples of the Union of Soviet Socialist Republics and the United States of America"; the applicability of "cy pres doctrine" and "deviation doctrine"; and whether "the fact that the Union of Soviet Socialist Republics no longer exists as a political entity is of no importance in carrying out the terms of the trust in accordance with the intent of Walter

Havighurst" (*Find. of Fact No. 29, at 79a; Concl. of Law No. 13, at 82a*). The probate judge addressed various and sundry other issues in his "Findings of Fact and Conclusions of Law", with four of the most critical inserted, verbatim, into both the "Findings of Fact" and the "Conclusions of Law" portions of that ruling (*See: App. E, 118a-120a*).

Thus, the presence of a jury in this case would have served the beneficial function of causing the judge to separate issues of fact from issues of law. In addition, a jury would have provided common sense experience to make findings of fact. Average citizens are capable of determining facts involving a man's intent even if the subject matter might appear overlaid with expert opinions and academic jargon. "The commonsense judgment of a group of laymen" is an "essential feature" of a jury trial and the function served by it in contemporary society. *Apodaca v. Oregon*, 406 U.S. 404 (1972). The identity of the factfinder is a crucial element bearing on the outcome of a case.

This Court's attention should be given to the substantial constitutional rights in this case. It is apparent that over the next several decades unprecedented amounts of property will pass from one generation to another, from individuals to the state and federal governments by way of estate taxation, and from individuals to tax-exempt groups and charities. It is important that these transfers and exactions be handled with care and respect for the constitutional rights of the numerous individuals and entities involved in such process.

II.

Certiorari Should Be Granted So This Court Can Analyze and Define Certain Specific Property Interests Which Cannot Be Overriden By Governmental Actors Except By Paying Compensation to Property Holders, as Required by the Fifth and Fourteenth Amendments.

The second question Petitioners ask this Court to address is whether the State of Ohio, through a state court judge, can reach out and 'take" private property interests inuring to heirs at law without providing any compensation. The property interests taken are rights in reversion to the corpus of an ongoing charitable trust. While testator did not include a clause in his will stating "I reserve the reversionary interest in this charitable trust to my heirs at law," such interests are implanted therein by operation of law.

Here, the testator had specified a private charitable trust with carefully crafted instructions, conditions, and beneficiaries, but the trial court's order has transformed it into a public charitable trust with only one beneficiary, Miami University of Ohio, a state instrumentality. The result of the entry of the decree by the state court judge stating that the heirs of Walter Havighurst "have no reversionary interest in the trust estate" (Concl.of Law No. 24; App. B, 86a) is a "taking" by a state judicial actor, and as such, "state action" (*Shelley v. Kraemer, supra,* 334 U.S at 14), triggering

the need to award just compensation to the heirs under the Takings Clause, the Fifth Amendment to the Constitution of the United States, which is made applicable to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226, 239 (1897).

The probate court acted *ipse dixit* here and erroneously invoked its state powers. The familiar words of the Fifth Amendment - "nor shall private property be taken for public use, without just compensation" - protect citizens against such actions. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), like the case *sub judice*, involves a state court's invocation of power to effectuate a constitutionally impermissible "taking". As Justice Blackmun wrote for a unanimous Supreme Court in *Webb's*:

> "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation. . .This is the very kind of thing that the Takings clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power."

Id., at 164.

In looking at whether there is a "taking", it is essential that a cognizable property interest exist. The corpus of Walter Havighurst's charitable trust consisted of several simultaneous estates: the legal estate held by the First National Bank of Southwestern Ohio as Trustee; the

equitable estate by the trust's beneficiary, and the reversionary estate held by the testator's heirs at law. To remove the reversionary property interests in order to liberate them for use by the State of Ohio is an unconstitutional taking requiring compensation.

William Blackstone, the eminent scholar on the common law, described interests and rights in property to be a "bundle of sticks". W. Blackstone, Commentaries on the Laws of England (Vols. I-IV, 1765-1769). This construct illustrates that various persons or entities may have rights vis a vis particular property and that property has various characteristics and aspects. Indeed, the constitutional deficiencies of the federal statute scrutinized recently by this Court in *Babbitt v. Youpee*, __ U.S. __, 117 S.Ct. 727, 136 L.Ed.2d. 696 (1997) arose from the fact such statute "continue[d] to completely abolish one of the sticks in the bundle of rights [constituting property]." *Id.*, citing the Ninth Circuit Court of Appeals' decision in *Youpee*, 67 F.3d 194, at 200 (1995). Even though a particular stick in the "bundle" might appear to be a slender one, however narrow the bounds of a particular property right, whatever is within those bounds counts as property.

"Property interests. . .are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972). The right to reversion has unquestionably attained status as a cognizable property interest under Ohio law; therefore, such a

right must be honored and protected from constitutionally impermissible encroachment.

Two Ohio Supreme Court cases and an Ohio statute demonstrate that rights of reversion are cognizable property interests under Ohio law. The first, *Bd. Of Ed. Of Incorporated Village of Van Wert [Edson] v. Inhabitants of Said Town*, 18 Ohio St. 221, 98 Am.Dec. 114 (1868), *overruled in part on other grounds* in *Babin v. City of Ashland*, 160 Ohio St. 328, at 345, 116 N.E. 2d 580, at 596 (1953), has never been overruled on the principle for which it is here cited: that courts of the State of Ohio simply do not have the power to legitimately extinguish the right of reversion. "Is it competent for a court…to extinguish forever the right of reversion…?" the *Van Wert* court asked. Its answer was, "We think judicial power can not legitimately be so far extended." 18 Ohio St. at 226. From the court's perspective in the *Van Wert* case, the extinguishing of rights to reversion is an *ultra vires* act. In this sense *Van Wert* was a precursor to *Webb's Fabulous Pharmacies, supra*, given the latter's utilization of the phrase "*ipse dixit*" to describe an attempt by a state actor to take as its own, under the authority of state statute, private property that is subject to state court jurisdiction.

The second case supporting the proposition that there is a cognizable property right known as the right to reversion under Ohio law is *McMecham v. Bd. Of Education*, 157 Ohio St. 241, 105 N.E. 270 (1952). There, the Ohio Supreme Court made a three-fold finding in its syllabus: 1) lands appropriated by a board of education and subsequently abandoned for specific use of school house revert to

donor or donor's heirs; 2) where there is a taking of private property for public purposes the extent of the interest acquired may not be enlarged by implication; and 3) heirs could not be divested of their contingent right of reversion.

Further, the Ohio Legislature provides for the alienability of rights in reversion in Ohio Revised Code Section 2141.04, which states that "[r]emainders, whether vested or contingent, are descendible, devisable, and alienable in the same manner as estates in possession." *Moore v. Foreman*, 72 Ohio St. 559 (1962) applies this statute. See also: *Merchant v. Adair*, 113 Ohio App. 513, 179 N.E. 2d 159 (1960) (holding that reversionary property interests pass and vest in heirs under the statute of descent and distribution).

Charitable estates can, and sometimes do, fail years after their creation. As noted by Justice Black in *Evans v. Abney*, 96 U.S. 435, 447 (1970) (where a charitable trust failed some forty years after its creation), failure of ongoing charitable trusts "is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death." *Id*, at 447. Petitioners assert the right to claim their rights in reversion upon this charitable trust's possible failure or inability to be carried out in the future.

Put another way, the heirs of testator were stripped of their right to succeed in title to the legal and equitable interests in the trust's corpus now held by the First National Bank and Miami University. As an author of a treatise on trusts asserts, if one of more of the following contingencies

happens, the corpus of a charitable trust established for a particular purpose can revert to the heirs: 1) purpose of the trust has become accomplished; 2) purpose has become impossible of achievement; 3) purpose has become illegal. G. Bogert, *Trusts and Trustees*, Sec. 400 (2d ed. rev. 1991), pp. 396-97. Here, if one of the foregoing events were to put an end to the trust some years hence, Walter Havighurst's heirs at law would be foreclosed from succeeding to their proportionate shares because of the trial court's extraordinary order in this regard.

That the probate court judge intended a "taking" of this property interest inuring to the heirs of Walter Havighurst cannot be doubted by reason of the following. First, the probate judge wrote: "Under these circumstances the heirs of the testator have no reversionary interest in the trust estate." (*App. B, 65a*). Second, (at *App. B, 67a*), the court ordered, adjudged and decreed that "the terms of the charitable trust, as set out in the Last Will and Testament of Walter E. Havighurst, create no reversionary interest in the trust estate." Third, in a second Order (at App. B, 90a), he again ordered, adjudged and decreed "that the terms of the charitable trust, as set out in the Last Will and Testament of Walter E. Havighurst, create no reversionary interest in the heirs of Walter E. Havighurst." Finally, he crafted Conclusion of Law No. 24 to read: "The heirs of the Walter E. Havighurst [sic] have no reversionary interest in the trust estate." (*App. B, 86a*)

The extinguishment of reversionary interests of heirs at law in a charitable trust is especially egregious from a

constitutional perspective where, as here, the plaintiff asked in its complaint that "Miami University" be recognized as "the beneficiary of the charitable trust." (emphasis supplied) (*115a, para. 11*), and the probate court complied insofar as it designated Miami University as "a member of the class of beneficiaries of the Walter E. Havighurst Fund" (*Concl. of Law No. 9; 82a*), failing altogether to name the *rest* of said class. Miami University is expressly declared to be a "state university" by Ohio Revised Code Sec. 3315.011. In Ohio, a state university is "an instrumentality of the state", *Collins v. University of Cincinnati*, 3 Ohio App. 3d 183, 444 N.E. 2d 459, at 461 (Hamilton Cty. App. 1981); *Bailey v. Ohio State University*, 487 F. Supp. 601, 605 (S.D. Ohio 1980); or "an arm or alter ego of the state." *Mackey v. Cleveland State University*, 837 F.Supp. 1396, at 1404 (N.D. Ohio 1993).

It was to another arm of the State of Ohio, then, that the Ohio Probate Court judge effectively transferred ownership, to the detriment of the heirs of Walter Havighurst, when he entered orders extinguishing the heirs' reversionary interests in the charitable trust. As well, the court effectively transformed a bequest in trust to a private banking institution as trustee for specific projects for the benefit of a broad range of individuals, including the peoples of the United States of America and the Union of Soviet Socialist Republics, or former Union of Soviet Socialist Republics, into for what has become, from a legal perspective, for all intents and purposes a "gift" for the benefit of the State.

Over a century ago this Court, in

Hopkins v. Grimshaw, 165 U.S. 342, 356-57 (1897), held that property in a charitable trust no longer capable of being carried out must be distributed to heirs at law under a "resulting trust theory". *Evans v. Abney*, *supra*, similarly involved a failed charitable trust. Reversionary interests have a long history in property law and their vitality has continued to present day. At the same time there is evidence the court and legislative bodies have been construing property interests more comprehensively in recent decades to reflect societal changes and economic realities. Nonetheless, here, this Ohio probate court judge was not deterred from taking such reversionary interests *from* the heirs of Walter Havighurst and *for* the benefit of the State of Ohio.

In *Hodel v. Irving*, 481 U.S. 704 (1987) and *Babbitt v. Youpee*, *supra*, this Court viewed governmental abrogation of property rights relating to devise and descent as effectuating "a taking of private property without just compensation, in violation of the Fifth Amendment of the Constitution of the United States." *Youpee*, 117 S.Ct. at 729, citing *Hodel v. Irving*, 481 U.S. 704, at 716-718. As well, the United States Court of Appeals for the Federal Circuit, in *Skip Kirchdorfer v. United States*, 6 F.3d 1573 (Fed. Cir. 1993), supported the proposition that state law claims involving personal property (there, valid liens) may generate legally cognizable property interests requiring compensation within the scope of the Fifth Amendment. *Id.*, at 1580.

The continued viability of heirs' rights of reversion work, at least theoretically and before the decision *sub judice*, to serve a

salubrious societal interest in that they operate in such a way as to give the heirs "standing" to monitor the actions of the Trustee to ensure that the charitable trust's income and corpus, if necessary, are being expended in a manner consonant with the terms of the trust - or, in this case, the reconstituted terms of the trust. *See*: *Maria Miller v. Teachout*, 24 Ohio St. 525, at 535-36 (1874) (heir at law or attorney general may "invoke the interposition of the courts" if trustee abuses his power or if the exercise by the trustee of his powers becomes impossible).

While the Ohio Attorney General is delegated statutory authority also to oversee charitable trusts in Ohio, she obviously has a conflict of interests here where her role as charitable trust enforcement officer assigned the responsibility of assuring that charitable trusts are administered for their beneficiaries conflicts with her status as an executive in the government of the State of Ohio. Thus, one has here the anomalous situation of a state court judge's opinion making the state the beneficiary of a so-called charitable trust which will remain under the auspices of the state Attorney-General's Office, with resulting concerns about possible conflicts of interests.

It should now be clear that the state probate court's "unlawful attempt to extinguish rights arbitrarily, whatever might be the purpose" (*Wilson v. Iseminger*, 185 U.S. 55, 62 (1902), is an unconstitutional attempt to overreach the limits of judicial power. Further, the historic role of the heirs as watchdogs over the trust's proper

expenditures would be eliminated by the court's action.

The State has here run roughshod over the property rights of citizens, arbitrarily taking for itself without just compensation that which "belongs" to its citizens while in the process of administering an estate, thereby violating the Fifth and Fourteenth Amendments to the United States Constitution. It is extremely important not to let such actions go unchecked.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CASE NOS. CA96-03-047
CA96-03-048

OPINION
6/2/97

FIRST NATIONAL BANK OF SOUTH-WESTERN OHIO, Executor of the Estate of Walter E. Havighurst,
Plaintiff-Appellee,

-vs-

MIAMI UNIVERSITY,
and
BETTY D. MONTGOMERY, OHIO ATTORNEY GENERAL,
Defendants-Appellees,
and
ALAN W. HAVIGHURST and DOUGLAS HAVIGHURST,
and
Defendants-Appellants,
and
MARIAM HAVIGHURST JOHNSON, et al.,
Defendants.

CASE NOS. CA96-03-047
CA96-03-048

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Per Curiam. This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon the briefs of counsel, oral argument having been waived. Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App.R. 12(A) as follows:

Defendants-appellants, Alan W. Havighurst and Douglas A. Havighurst, have taken the instant appeals from the entry of a declaratory judgment favorable to plaintiff-appellee, First National Bank of Southwestern Ohio ("FNB"), in its capacity as the executor for the estate of Walter E. Havighurst.[1] Appellants present on appeal three assignments of error, in which they challenge the balance struck by the probate court in weighing the evidence before it, the denial of their demands for a jury trial, and various evidentiary rulings. Finding no merit to any aspect of the challenge advanced on appeal, we affirm the judgment of the court below.

The parties' dispute centers on a charitable trust created by the Last

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[1] These appeals have been consolidated for purposes of briefing, argument and disposition.

Will and Testament of FNB's decedent, Walter E. Havighurst ("testator"). The testator executed the will creating the trust on September 7, 1988, and amended it by a codicil dated October 11, 1989. The testator died on February 3, 1994, and, on February 11 of the same year, the will was admitted to probate.

The will made specific bequests of money and/or property to the testator's heirs, including the appellants, and to Miami University, where the testator had served as a professor until his retirement. The will then bequeathed the balance of the testator's estate to FNB, in trust, and directed that it "be used *** to promote and fund educational projects through the Miami University International Center *** for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics."

On October 20, 1994, FNB, as executor of the testator's estate, filed an action in the Probate Division of the Butler County Court of Common Pleas, seeking declaratory relief regarding the viability of the trust in the wake of the December 1991 dissolution of the Union of Soviet Socialist Republics ("USSR"). Specifically, FNB sought declarations that the trust created n reversionary interest in the testator's heirs; that the will creating the trust authorized FNB, as trustee, to fund "programs related to the [USSR] as it previously existed *** [and] programs related to the people and institutions previously or currently located within

the areas formerly occupied by the [USSR] ***"; and that the trust was to be funded and executed according to its terms.

Appellants each responded to FNB's complaint with an answer and a counterclaim for declaratory relief. In their counterclaims, as subsequently amended, appellants sought declarations that the political, economic and social conditions of the USSR at the time that the will was executed differed significantly from the conditions at the time that the complaint was filed; that the trust cannot be carried out in accordance with its terms; that Miami University's conduct and its status as an instrumentality of the state of Ohio precludes the preservation of the trust under any equitable doctrine; that the proposed gift by trust has thus failed; and that the residuary estate thus constitutes intestate property that must pass pursuant to R.C. 2105.06, the Statute of Descent and Distribution. Douglas Havighurst, in his counterclaim, additionally and in the alternative sought the implementation of a plan that would require the participation of the testator's heirs and would promote "conflict management[;] *** the reduction of tribal, racial, and ethnic aggression; and [the] management of nuclear materials."

The matter was tried to the probate court, and on December 15,1995, the court entered its Opinion and Judgment Entry of Declaratory Judgment, in which it construed the will to preserve the trust. On February 20, 1996, the court, upon appellants' motions,issued its Amended Entry of Declaratory Judgment

and Findings of Fact and Conclusions of Law, and these appeals ensued.

I.

In their first assignment of error, appellants contend that the probate court erred in declining to declare that the testator's attempted gift in trust had failed and, upon such declaration, to distribute the trust assets to the heirs at law, when the dissolution of the USSR mandated the termination of the trust. Appellants thus, in effect, assail the dismissal of their amended counterclaims and, in essence, challenge the balance struck by the probate court in weighing the evidence adduced at trial. We find no merit to this challenge.

A probate court, in a declaratory judgment action, is authorized to construe a will and to declare the rights and legal relations of persons interested in the administration of an estate or a trust. See R.C. 2101.24(A)(1)(k), 2721.03 and 2721.05(C). The court below, in its amended entry of declaratory judgment, declared that the trust created by the testator's will was a charitable trust and that the will created no reversionary interest in the testator's heirs. The court construed the will's use of the term "Union of Soviet Socialist Republics" to also mean the "former Union of Soviet Socialist Republics" and construed the will's use of the term "Soviet Union" to also mean the "former Soviet Union." Finally, the court ordered that the trust be "fully funded and carried out in

accordance with its terms."

We note at the outset that, in the opinion accompanying the initial entry of declaratory judgment, entered on December 15, 1995, the probate court, having construed the terms "Union of Soviet Socialist Republics," and "Soviet Union" to preserve the trust, concluded that its application of the doctrines of cy pres and deviation would have yielded the same result. T.D. 224, at 13-14. The court's amended entry of declaratory judgment and its findings of fact and conclusions of law, entered on February 20, 1996, superseded the court's December 1995 opinion and entry of judgment, yet manifested the purpose expressed by the court in its superseded opinion to construe the will to uphold the trust without resort to the doctrines of cy pres or deviation. We agree that any discussion of the doctrines would be superfluous. Therefore, we do not reach those aspects of appellants' challenge on appeal that are predicated upon the probate court's alleged misapplication of the doctrines.

Turning then to the merits of appellants' first assignment of error, we note that a court's sole purpose in construing a will is to ascertain and effectuate the intention of the testator. The court must discern the testator's intention from the language of the will. Carr v. Stradley (1977), 52 Ohio St.2d 220, paragraph one of the syllabus; Townsend's Exrs. v. Townsend (1874), 25 Ohio St. 477, paragraphs one and two of the syllabus. However, when the language of the will creates doubt

as to its meaning, the court may consider extrinsic evidence to aid in its determination of the testator's intention. Oliver v. Bank One Dayton. N.A. (1991), 60 Ohio St.3d 32, paragraph one of the syllabus (following Sandy v. Moubot [1982], 1 Ohio St.3d 143, 145).

The court below preserved the trust by construing the terms "Union of Soviet Socialist Republics" and "Soviet Union" to also mean the "former Union of Soviet Socialist Republics" and the"former Soviet Union." The court's construction of these terms was based upon its conclusions that the testator's "primary purpose" in creating the trust was "educational"; that "[t]he testator intended the terms 'Union of Soviet Socialist Republics,' 'Soviet Union,' and 'Soviet' to primary be [sic] descriptive of the 'peoples' that inhabited that area of the world"; and that the testator did not intend that the continued existence of the USSR as a "political entity" be an "integral factor in *** the creation and administration of the [trust]." T.D. 233. These conclusions were, in turn, based upon the court's reading of the text of the will creating the trust and upon testimony adduced at trial that the word "peoples, as used in the will, could be construed to mean the "ethnic ***, cultural ***, linguistic, [and] religious communities" within a "geographical area." T.p. 143-144.

Appellants' counterclaims were predicated upon the assertion that the testator's aim in creating the trust was to ease Cold War tensions between the

United States and the USSR and that, with the demise of the USSR and the concomitant end of the nuclear threat that was the Cold War's most salient feature, the trust has failed in its essential purpose. As we noted supra, the probate court found the language of the will and the evidence adduced at trial to bespeak a purpose on the part of the testator in creating the trust that was educational rather than political, and more personal than institutional. Furthermore, the evidence was uncontroverted that the region still possesses a nuclear capacity that, with the demise of the USSR as a political entity and the consequent destabilization of the region continues to pose a threat to the United States.

The Ohio Supreme Court in C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, syllabus, held that "[j]udgments supported by some competent, credible evidence going to all of the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." Our review of the record of the proceedings below discloses that the probate court had before it competent and credible evidence to support its entry of declaratory judgment preserving the trust and its dismissal of appellants' counterclaims. We, therefore, overrule appellants' first assignment of error.

II.

In their second assignment of error, appellants challenge the denial of their demands for a jury trial. This challenge is equally untenable.

The Seventh Amendment to the United States Constitution secures the right to a jury trial in a civil action. This guarantee is not, however, applicable to the states. Minneapolis & St. Louis RR. Co. v. Bombolis (1916), 241 U.S. 211, 217, 36 S.Ct. 595, 596; Digital & Analog Design Corp. v. North Supply Co. (1992), 63 Ohio St.3d 657, 662, fn. 1. Article I, Section 5 of the Ohio Constitution similarly preserves "inviolate" the right to a jury trial in a civil action. The right has been judicially limited, however, to those causes of action to which the right adhered that were recognized at common law prior to the adoption of the state constitution. Digital & Analog Design Corp., supra at 661; Pokorny v.International Hod Carriers Bldg. & Common Laborers Union (1974), 38 Ohio St.2d 177, 180.

The right to a jury trial may also be extended by statute. R.C. 2721.10 governs the determination of issues of fact in a declaratory judgment action and provides that "such issue[s] may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." R.C. 2101.31, which governs the determination of issues of fact in proceedings before a probate court, provides that "[a]ll questions of fact shall be determined by the probate judge, unless he orders them tried by a

jury ***."

Appellants endorsed upon their answers and counterclaims demands for a jury trial. The probate court, upon FNB's motion and following a hearing on the matter, exercised the discretion conferred by R.C. 2101.31 and denied appellants' jury demands.

Appellants contend that the probate court's denial of their demands for a jury trial constituted an error of law and an abuse of discretion. We disagree.

A.

The Ohio Supreme Court in Renee v.Sanders (1953), 160 Ohio St. 279, addressed the issue of whether a litigant in a declaratory judgment action instituted in a probate court possesses a constitutional or statutory right to a jury trial. The court held that the Ohio Constitution does not preserve the right to a jury trial in a declaratory judgment action, because such an action did not exist at common law prior to the adoption of the constitution. Id., paragraph three of the syllabus. The court further held that the Revised Code confers no absolute statutory right to a jury determination of factual issues arising in a declaratory judgment action in probate court. Id., paragraph three of the syllabus. The court thus concluded that, if the subject matter of a declaratory judgment action is within the jurisdiction of the probate court, R.C. 2101.31 (former G.C. 10501-32) governs the trial of the issues, and the determination of whether factual issues will be tried to a jury is committed to

the sound discretion of the probate court. Id., paragraph five of the syllabus; accord, Giurbino v. Giurbino (1993), 89 Ohio App.3d 646; Bobko v. Sagen (1989), 61 Ohio App.3d 397.

R.C. 2101.24(A)(1)(j) and (k) grant the probate court exclusive jurisdiction "[t]o construe wills" and "[t]o render declaratory judgments***." R.C. 2101.24(B)(1)(b) grants the probate court jurisdiction, concurrent with the general division of the common pleas court, "to hear and determine *** [a]ny action that involves *** a charitable trust ***."

In its complaint, FNB invoked the jurisdiction conferred upon the probate court by R.C. 2101.24 and sought declaratory relief involving the charitable trust created by the testator's will. Appellants' counterclaims sought contrary declaratory relief regarding the trust. R.C. 2101.31, therefore, controlled the proceedings at trial and vested the probate court with the discretion to determine whether the factual issues presented in the complaint and the counterclaims would be tried to a jury.

We perceive the relief sought in FNB's complaint and appellants' counterclaims to be predominantly equitable in nature. See Gearhart v. Richardson (1924), 109 Ohio St. 418, paragraph one of the syllabus (holding that an action construing a will creating a trust is equitable in nature); accord Sessions v. Skelton (1955), 163 Ohio St. 409, paragraph seven of the syllabus. Therefore, we cannot say that the probate court's denial of appellants' demands for

a jury trial on the factual issues thereby presented constituted an abuse of its discretion.

B.

Our analysis of appellants' alternative challenge to the denial of their jury demands proceeds from the R.C. 2721.10 requirement that issues of fact in a declaratory judgment action be tried "in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." R.C. 2311.04, which governs the proceedings in the general division of the common pleas court, provides in relevant part:

> Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury***. All other issues of fact shall be tried by the Court, subject to its power to order any issue to be tried by a jury ***.

Thus, the determination of whether factual issues in a declaratory judgment action will be tried to a jury, while purely a matter of discretion in the probate court, may be a matter of right in the general division of the common pleas court.

Appellants assert that this statutory scheme creates an irrational legislative distinction, in violation of the equal protection guarantees of Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States

Constitution. This challenge fails in its central premise.

We note at the outset that the Ohio Supreme Court in its decision in Renee, supra, acknowledged the potential conflict between R.C. 2101.31 and 2311.04, without confronting the equal protection implications. The court noted that the two sections have coexisted since 1853, found no statement in the Revised Code to suggest that R.C. 2311.04 supersedes or overrides R.C. 2101.31, and posited that a determination that R.C. 2311.04 mandated a jury trial would effectively nullify R.C. 2101.31. Id. at 284-285. Having set forth these considerations and held that R.C. 2101.31 vests in the probate court the discretion to determine whether factual issues would be tried to a jury, the court declared its holding to be "entirely consistent with the provisions of [R.C. 2721.10] and *** not [in] conflict with the provisions of [R.C. 2311.04]." Id. at 286.

The constitutionally secured guarantee of equal protection under the law "'implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination.'" Conley v. Shearer (1992), 64 Ohio St.3d 284, 288, quoting Sexton v. Barry [C.A.6, 1956], 233 F.2d 220, 224. When, as here, a legislative classification implicates neither a fundamental right nor a suspect class, the classification is invalid only if it bears no rational relationship to a legitimate

governmental objective. Adkins v. McFaul (1996), 76 Ohio St.3d 350, 351. See, also, McGowan v. Maryland (1961), 366 U.S. 420, 426, 81 S.Ct. 1101, 1105 (holding that"[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived of to justify it").[2]

As we noted supra, the probate division and the general division of the common pleas court have concurrent jurisdiction to hear and determine an action involving a charitable trust. R.C. 2101.24(B)(1)(b). FNB, therefore, could have instituted and maintained its declaratory judgment action in either the probate division or the general division of the common pleas court.

Once FNB chose to proceed in probate court, appellants' options were limited. As between courts of concurrent jurisdiction, the court that first acquires jurisdiction over the parties has exclusive jurisdiction to adjudicate the matter. Kane v. Kane (1946), 146 Ohio St. 686, syllabus; accord State ex rel. Largent v. Fisher (1989), 43 Ohio St.3d 160, 162 (citing Miller v. Court of Common Pleas (1944), 143 Ohio St. 68, 70). Appellants' counterclaims were compulsory, see Civ.R. 13(A), and being second in time to FNB's claims, they could be asserted only as counterclaims to the complaint filed by FNB in the probate court.

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2. State and federal law provide essentially the same standard for assessing an equal protection violation. Adkins v. McFaul (1996), 76 Ohio St. 3d 350, 351.

Appellants' equal protection challenge is thus premised upon their contention that, had FNB instituted its declaratory judgment action in the general division, rather than the probate division of the common pleas court, R.C. 2311.04, rather than R.C. 2101.31, would have governed the proceedings at trial and would have mandated that the factual issues be tried to a jury. We are not persuaded, however, that R.C. 2311.04 would have conferred upon appellants a right to a jury trial on the factual issues presented in the complaint and in their counterclaims.

As we noted supra, R.C. 2721.10 and 2311.04 mandate a jury trial of factual issues arising in a declaratory judgment action instituted in the general division of the common pleas court if the action is construed to be "for the recovery of money only, or specific real or personal property." The right to a jury trial thereby conferred depends upon the nature and character of the relief sought. Erie Ins. Group v. Fisher (1984), 15 Ohio St.3d 380, 382; Gunsaullus v. Pettit (1988), 46 Ohio St. 27, 29.

When the relief sought is equitable, R.C. 2311.04 confers no right to a jury trial. Erie Ins. Group, supra at 382; City Loan & Savings Co. v. Howard (1984), 16 Ohio App.3d 185, 186. When the pleadings seek a mixture of legal and equitable relief, the right to a jury trial depends upon the action's primary and predominant objective. See, e.g., Murello Constr. Co. v. Citizens Home Savings Co. (1985),

29 Ohio App.3d 333, 334 (holding that a jury trial was not required when the money demand, although specific, was "incidental and ancillary" to the equitable relief requested and would ripen only if equitable relief were granted); Huntington Nat'l. Bank v. Heritage Investment Group (1983), 12 Ohio App.3d 113, 114 (holding that R.C. 2311.04 confers a right to a jury trial on a legal counterclaim that, if true, would extinguish the original equitable claim, but confers no right on a legal counterclaim that is "incidental or ancillary" to the original claim).[3]

In its complaint, FNB sought declaratory relief involving the charitable trust created by the testator's will. Appellants, in their counterclaims, sought contrary declaratory relief regarding the trust, including a declaration that the proposed gift by trust has failed and

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[3] This principle may be seen as a logical extension of the Ohio Supreme Court's decisions in Nordin v. Coulton (1943), 142 Ohio St. 277, and Ireland v. Cheney (1935), 129 Ohio St. 527. The court held in Nordin, paragraph two of the syllabus, that an action is equitable if the right to equitable relief must be determined before legal redress can be granted, but is "at law" if the "primary or paramount" relief sought is legal and the equitable redress is merely incidental. The court held in Ireland, paragraph two of the syllabus, that when the "principal, primary and paramount relief sought***is equitable, the cause is one in chancery notwithstanding the fact that ***incidental thereto the court is compelled to find what amount, if any, is due and owing to the person seeking the relief.

that the residuary estate thus constitutes intestate property that must pass pursuant to the statute of descent and distribution.

The factual issues thereby presented cannot be said to have arisen in an action "for the recovery of money only, or specific real *** property." Nor are we persuaded that appellants' counterclaims transformed the action into one "for the recovery of *** personal property." Even if we were to so characterize appellants' counterclaims, based upon their prayer for a declaration requiring the intestate distribution of the property, such relief would merely be incidental to the declaratory relief sought and would ripen only upon the entry of declaratory relief favorable to appellants. See Murello Constr. Co., supra at 334.

We conclude, instead, that the relief sought was primarily and predominantly equitable. See Gearhart, supra, paragraph one of the syllabus (holding that an action construing a will creating a trust is equitable in nature); accord Sessions, supra, paragraph seven of the syllabus. Therefore, R.C. 2311.04 would not have conferred upon appellants a right to a jury trial.

In the absence of such a right, the challenged statutory scheme does not, with respect to appellants, create the legislative distinction upon which their equal protection argument rests. We, therefore, hold that the probate court's exercise of the discretion conferred by

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R.C. 2101.31 to deny appellants' demands for a jury trial did not violate their constitutionally secured rights to equal protection under the law.[4]

Having thus determined that the probate court's denial of appellants' demands for a jury trial constituted neither an error of law nor an abuse of discretion, we overrule the second assignment of error.

III.

In their third and final assignment of error, appellants challenge the probate court's exclusion of evidence relevant to the testator's intention in establishing the trust and to the issue of whether the trust had failed in its purpose. We find no merit to any aspect of this challenge.

As we noted supra, the probate court preserved the trust by construing the terms "Union of Soviet Socialist Republics" and "Soviet Union" to also mean the "former Union of Soviet Socialist Republics" and the "former Soviet Union." This construction was based, in part, upon testimony by a witness for FNB that the word "peoples," as used in the will, could be construed to mean the "ethnic***, cultural***, linguistic, [and] religious communities" within a "geographical area." Appellants contends that the probate court precluded them from demonstrating that the proposed "change [in] nomenclature"

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[4] Appellants lack standing to mount a third-party equal protection challenge to this legislative scheme. See Cincinnati v. Thompson (1994), 96 Ohio App. 3d 7, 26, fn. 8.

would effect a substantive change in the provisions of the trust, when the court sustained FNB's objection to defense counsel's attempt to elicit testimony, upon cross-examination of the witness, that the trust, "is impractical and in fact impossible to carry *** out as written."

The question posed by defense counsel, in essence, sought expert opinion testimony on the dispositive issue posed by appellants' counterclaims, i.e., whether the trust had failed in its essential purpose. Evid.R. 702 and 704 permit expert opinion testimony that embraces the ultimate issue to be decided by the trier of fact if: (1) the witness is qualified as an expert "by knowledge, skill, experience, training or education"; and (2) "scientific, technical, or other specialized knowledge" will assist the trier of fact to understand the evidence or to decide an issue of fact.

The witness from whom the excluded testimony was sought was qualified as an expert on "international affairs," not the law. He, therefore, did not possess the qualifications to render an expert opinion on the legal effect of a "change [in] nomenclature" on the trust. Alternatively, the probate court might well have concluded that whatever specialized knowledge the witness did possess would have been of no assistance to the court, as the trier of fact, in resolving the issue before it. We, therefore, find no error in the court's exclusion of this testimony.

B.

Appellants also sought, without success, to introduce into evidence a will that the testator allegedly executed in 1987 to show the testator's intention in executing the 1988 will creating the trust. As we noted supra, a court, in construing a will, may look beyond the language of the will and consider extrinsic evidence to aid in its determination of the testator's intention when the language of the will creates doubt as to its meaning. Oliver, 60 Ohio St.3d 32, paragraph one of the syllabus. The decision as to whether and to what extent such extrinsic evidence will be considered in determining the testator's intent is thus committed to the sound discretion of the trial court. We cannot say that the probate court's refusal to consider such evidence in this instance constituted an abuse of discretion.

C.

Finally, the probate court sustained FNB's objection to defense counsel's attempt to elicit, on cross-examination of FNB's international international affairs expert, testimony as to whether, at the time that the will will creating the trust was executed, "the mind that wrote [the will] and understood and signed it could *** possibly have been thinking the same [as] we are thinking today." T.p. 120. We perceive no error in the court's exclusion of this testimony.

The witness clearly lacked the requisite firsthand knowledge to offer

testimony or to express a lay opinion as to the testator's "thinking" in executing the will creating the trust. See Evid. R. 602 and 701. The court, again, might reasonably have excluded expert opinion testimony to that effect, either on the ground that the witness was not qualified to express an expert opinion on the matter or on the basis that expert opinion testimony would not have been helpful to the court's resolution of the issue. See Evid.R. 702. Furthermore, we cannot say that the court's refusal to consider such extrinsic evidence relevant to the testator's intention constituted an abuse of discretion.

Finding no merit to any of appellants' evidentiary challenges, we overrule the third assignment of error.

Having thus considered and found wanting each of appellants' three assignments of error, we affirm the judgment of the trial court.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas, Probate Division, for execution upon this judgment and that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

Costs to be taxed in compliance with App. R. 24.

SHANNON, P.J., DOAN and GORMAN, JJ., concur.

Shannon, J., retired, of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

Doan, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), of the Ohio Constitution.

Gorman, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), of the Ohio Constitution.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	APPEAL NO. CA 96-030047 CA 96-030048 TRIAL NO. 94-0175
Plaintiff-Appellee,	
-vs-	JUDGMENT ENTRY
MIAMI UNIVERSITY	
and	
BETTY D. MONTGOMERY, ATTORNEY GENERAL OF THE STATE OF OHIO,	
Defendants-Appellees,	
and	
ALAN W. HAVIGHURST	
And	
DOUGLAS A. HAVIGHURST,	
Defendants-Appellants,	
and	
MARIAM HAVIGHURST JOHNSON, ET AL.,	
Defendants.	

This cause having been heard upon the appeal, the record and briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the

trial court is affirmed for the reasons set forth in the Decision filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are to be taxed in complaince with App. R. 24.

The Court further orders that 1) that a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) that the mandate be sent to the trial court for execution pursuant to App. R. 27.

To the Clerk:

Enter upon the Journal of the Court on June 2, 1997 per Order of the Court.

/s/ Raymond Shannon
Presiding Judge

IN THE COURT OF APPEALS
FIR8T APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

FIRST NATIONAL BANK OF
SOUTHWESTERN OHIO

CA96-03-047
CA96-03-048

Appellee, :
vs.

MIAMI UNIVERSITY, et al. :
Appellant :

ENTRY TRANSMITTING
ERRATA

It appearing to the Court that through inadvertence in the Memorandum Decision and Judgment Entry filed herein on June 2, 1997 on the page two the Court indicated that oral argument had been waived.

Whereas in fact, argument was waived by counsel for the Attorney General only and not by other counsel.

Wherefore, it is the Order of this Court that the page two line five of the Memorandum Decision and Judgment Entry is corrected to reflect oral argument by all counsel except the Attorney General.

TO THE CLERK:(COPIES SENT TO ALL COUNSEL)
ENTER UPON THE JOURNAL OF
THE COURT ON JUNE 16 1997
PER ORDER OF THE COURT.

Presiding Judge

COURT OF COMMON PLEAS
PROBATE DIVISION
BUTLER COUNTY, OHIO

FILED
94 DEC 28 AM 11:51
BUTLER COUNTY
PROBATE COURT
JUDGE STEPHEN W. POWELL

First Nat'l. Bank of SWO, : CASE NO. 94-0175
Pl.

-vs- CASE SCHEDULING
Miami University et al., ORDER
Def. Judge Powell

1. This case is fixed for bench/(jury) trial 9/5/95 at 9:00 A.M.; for pretrial/settlement conference on _____ at ___.M.; for trial setting and consideration for referral to Alternate Dispute Resolution on _____at ____M.

2. All discovery will be completed by 4/3/95, except as provided otherwise by Court order. All Plaintiff's experts must be identified by 2/1/95, with discovery of expert testimony and opinion to be completed by _____. All Defendant's experts must be identified by 2/1/95 with discovery of expert testimony and opinions to be completed by _____.

3. All motions for summary judgment and motions to dismiss will be filed by _____.

4. Alternative Dispute Resolution;

be completed by _____with discovery completed by _____.

5. A joint pretrial statement shall be provided to the Court by the pretrial.

6. Jury Instructions/Trial brief must be submitted by the day before trial.

7. Other: Motions to Strike filed by Jan. 16, 1995. Response due 2/1/95. Plaintiff's response 2/8/95. Court's Ruling due 2/15/95.

Failure to comply with this order, the Rules of Civil Procedure, or the Local Rules of Practice may result in the imposition of sanctions by the Court.

SO ORDERED /s/Stephen W. Powell

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
BUTLER COUNTY, OHIO

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	*	CASE NO. 94-0175
	*	Judge Randy Rogers
PLAINTIFF		
VS.	*	
MIAMI UNIVERSITY, ET AL.	*	OPINION AND ENTRY OVERRULING DEMANDS FOR JURY
DEFENDANTS	*	

This matter came before the Court on July 12, 1995, for argument concerning Plaintiff's Motion to Strike or Otherwise Dismiss Jury Demand of Alan W. Havighurst and Douglas A. Havighurst filed by Plaintiff on January 17, 1995, and then again on August 22, 1995.

Revised Code Section 2101.31 provides:

> "All questions of fact shall be determined by the probate judge, unless he orders them tried by a jury, or referred, as provided in sections 2101.06 and 2101.07, and section 2315.26 to 2315.37, inclusive."

No party to a declaratory judgment action instituted in the Probate Court has any constitutional or absolute statutory right to trial by jury. Renee v. Sanders (1953), 160 Ohio St. 369, 116 N.E.2d 420.

Counsel for the Defendants/Counter-Claimants Alan W. Havighurst and Douglas A. Havighurst urged the Court in their Memorandum filed on January 31, 1995 and then again during the hearing which took place on July 12, 1995, to delay its ruling on this issue until "additional filings submitted to the Court, discovery, and the orderly movement toward an established date for trial will give the Court better perspective on the myriad issues in this case." Discovery has now been completed and this case is set for trial September 5, 1995.

The pleadings in the case sub judice raise issues of interpretation and/or construction of the terms of a will which has provisions seeking to establish a charitable trust. The Supreme Court of Ohio has previously ruled in Sessions v. Skelton (1955), 163 Ohio St. 409, and in Gearhart et al v. Richardson (1924) 109 O S 418, that such issues are primarily equitable in nature. The parties in this case have also interjected the doctrines of cy pres and deviation.

This Court understands that it has the right and power to grant the demands for jury. However, given the nature of the issues presented in this case, in the exercise of this Court's discretion, this Court does not deem it wise and proper to do so.

IT IS THEREFORE ORDERED that the Jury Demands of the Defendant/Counterclaimants Alan W. Havighurst and Douglas A. Havighurst are denied. Plaintiff's Motion to Strike or Otherwise Dismiss Jury Demand is granted.

/s/ Randy T. Rogers, Judge
Filed August 24, 1995

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
BUTLER COUNTY, OHIO

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	*	CASE NO. 94-0175
	*	Judge Randy Rogers
PLAINTIFF		
VS.	*	
MIAMI UNIVERSITY, ET AL.	*	OPINION AND ENTRY OVERRULING MOTION FOR SUMMARY
DEFENDANTS	*	JUDGMENT FILED BY PLAINTIFF, FIRST NATIONAL BANK OF SOUTHWESTERN OHIO

This matter came before the Court on July 12, 1995, for argument concerning the Motions for Summary Judgment filed by the Plaintiff. The Court having reviewed the pleadings, the memoranda and affidavits and other documents filed in support and in opposition to said Motion, and having reviewed the authorities cited therein and being otherwise advised finds that said Motion should be overruled at this time.

Summary judgment shall be granted if: "no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." Civ. R.

56; Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327, 364 N.E.2d 267, 274; Davis v. Loopco Industries, Inc. (1993), 66 Ohio St.3d 64, 609 N.E.2d 1093, 1097.

In First National Bank of Cincinnati v. Devlin, 63 Ohio App.3d 708, 580 N.E.2d ___ [sic:page number omitted](1989), the 12th District Court of Appeals of Ohio reversed a trial court ruling granting summary judgment to three hospices selected by the executor of an estate to receive the residue of the estate. In Devlin, supra, the decedent's will provided that the residue of decedent's estate be distributed by decedent's executor for "the benefit of hospices in small towns excluding Lebanon, Ohio devoted primarily to the care of patients terminally ill with chronic obstructive pulmonary disease particularly emphysema, selected by my executor." An action seeking construction of the decedent's will was filed by decedent's executor, First National Bank of Cincinnati, alleging that it was in doubt as to the true construction of the will and could not proceed without the direction of the court. Thereafter a number of hospices intervened in the action. While the action as pending the executor, after reviewing a substantial volume of information, chose three hospices that most closely met the provisions of the will; the court administering decedent's estate then approved the three recommendations. After the three hospices were selected by the executor in Devlin, supra, the three hospices then moved for summary judgment, which was granted by the trial court which

relied in an alternative way upon "the doctrine of cy pres and/or deviation." The appellate court reversed, finding that because of a conflict in the evidence submitted a genuine issue of material fact did exist. The appellate court went on to state that it "would be premature to determine the application of the cy pres or deviation doctrines when the issue as to the qualification or lack of qualification of the hospices under the terms of the will is still an open question."

The case sub judice is an action for declaratory judgment. Plaintiff has requested the guidance and approval of the Court and a declaratory judgment declaring, inter alia, (1)"that the terms of the Charitable Trust, as set out in the Will, creates no reversionary interest in the heirs of the Testator." (2) "that the Charitable Trust is to be fully funded and carried out, in accordance with its terms" and (3) "that the Trustee, consistent with the charitable intent of the Testator, is authorized by the terms of the Will to provide funding, as otherwise authorized by the Will, for programs related to the U.S.S.R. as it previously existed; for programs related to the people and institutions previously and currently located within areas formerly occupied by the USSR; and for other programs coming within the scope of the Charitable Trust as reasonably interpreted by the President of Miami University in the exercise of his or her sole discretion pursuant to the terms of the Charitable Trust."

Defendants/Counterclaimants Alan W. Havighurst and Douglas A. Havighurst have filed a complaint for declaratory judgment asking that the Court declare, inter alia, (1) "that the putative trust cannot be carried out in accordance with its terms", (2) that the proposed gift of trust must fail and lapse and (3) that "the residuary estate of testator be declared intestate property and pass according to the provision of the Statute of Descent and Distribution. . . ."

As in the Devlin case, the doctrines of cy pres and deviation and the propriety of their application to this case have been discussed by the parties. At this stage of the proceedings, Plaintiff's motion lacks merit and is accordingly overruled.

It IS THEREFORE ORDERED that the Motion for Summary Judgment filed by Plaintiff, First National Bank of Southwestern Ohio is hereby overruled.

/s/ Randy T. Rogers, Judge
Filed August 24, 1995

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
BUTLER COUNTY, OHIO

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	*	Case No.94-0175
	*	Judge Randy Rogers
Plaintiff	*	OPINION AND JUDGMENT ENTRY OF DECLARATORY
vs.		
MIAMI UNIVERSITY ET AL.	*	JUDGMENT
		FINAL APPEALABLE
Defendants		ORDER

* * * * * * *

The above entitled matter came before the Court for trial on September 4, 1995 on Plaintiff's Complaint for Declaratory Judgment, the Amended Counterclaim of the Defendant, Alan W. Havighurst, the Amended Counterclaim of Defendant, Douglas A. Havighurst, and the other pleadings filed herein and the Court having heard the testimony of the witnesses, examined the exhibits introduced at trial, and considered the arguments and memorandums of counsel does now render its Opinion and issue its judgment concerning the issues herein raised.

Walter E. Havighurst died on February 3, 1994. The Last Will and

Testament of Walter E. Havighurst dated September 8, 1988 and a Codicil to that Will dated October 11, 1989 were admitted to probate on February 11, 1994 in the Probate Court of Butler County, Ohio. Dr. Havighurst left assets valued at approximately $6,130,000 to be administered through his probate estate. Item III of the Havighurst Will provided, inter alia:

"ITEM III. A. I give and devise all of the real property I may own, or have an interest in at the time of my death, to Miami University, Oxford, Ohio. This bequest is unrestricted and the Board of Trustees may use and expend the same for the benefit of the University in any manner it deems appropriate.

B. To the individuals and institutions listed below, I give and bequeath the following:

1. To MIAMI UNIVERSITY, Oxford, Ohio any and all books owned by me at my death;
2. To MIAMI UNVIERSITY, Oxford, Ohio all of my papers, letters, manuscripts, and other items of literary interest. It is my desire that such items be placed in THE KING LIBRARY of MIAMI UNIVERSITY.
3. To SAMUEL NEFF, now residing in Richmond, Indiana, if he survives me, any automobile, typewriters, and luggage, owned by me at my death.
4. To MIAMI UNVIERSITY, Oxford, Ohio, my Hodgin painting of

Fisher Hall, presently hanging in my study, if owned by me at my death. It is my desire that said painting be placed in the Joseph M. Bachelor Room of Bachelor Hall, Miami University, Oxford, Ohio.

5. To my niece, RUTH NEFF, now residing in Richmond, Indiana, if she survives me, all furniture, appliances, rugs, draperies, silver, china, crystal, art objects, decorative pieces, and all other furnishings and items for household use, located in my residence at the time of my death.
6. To GOODWILL INDUSTRIES, all men's clothing which I own at the time of my death.

C. I give and bequeath to each of the following individuals as follows:

1. $100,000 to my sister, Mrs. MIRIAM HAVIGHUST JOHNSON, if she survives me;
2. $25,000 to BRUCE J. HAVIGHURST, now residing at 20861 Byron Road, Shaker Heights, Ohio 44122, if he survives me;
3. $25,000 to DOUGLAS A. HAVIGHURST, now residing at 1151 Haselton Road, Shaker Heights, Ohio 44121, if he survives me.
4. $25,000 to ALLAN W. HAVIGHURST, now residing at 3071 Huntington

Road, Shaker Heights, Ohio 44120, if he survives me[1] —

5. $25,000 to WALTER E. HAVIGHURST, now residing at 338 West 47 Street, New York, New York, 10024, if he survives me;
6. $25,000 to JAMPES P. HAVIGHURST, now residing at 52 Rapaki Road, Christchurch, New Zealand, if he survives me.
7. $25,000 to RUTH NEFF, now residing at 329 SW First Street, Richmond, Indiana 47374, if she survives me;

D. I give and bequeath to my niece, HELEN BERK, now residing at 2301 Cheryl Drive, Jacksonville, Florida 32017, if she survives me, the sum of $5,000.000.

E. If DOUGLAS A. WILSON and SUSAN WILSON, or either of them or their estates, or their beneficiaries thereof, should be indebted to me at my death, as evidenced by a note and a second mortgage executed by them and delivered to me, in the face amount of $50,000, or any renewals thereof, I direct and require that all of such indebtedness and all interest thereon be forgiven and cancelled in its entirely, it being my intention by the bequest to relieve said DOUGLAS O. WILSON and SUSAN WILSON, or either of them, or their estates, or their beneficiaries thereof of any obligation to repay said indebtedness, or any part thereof, or any interest thereon.

F. I give and bequeath the sum of

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[1] The name and address of Alan W. Havighurst were corrected in the October 11, 1989 Codicil to the Havighurst Will

$250,000 to MIAMI UNIVERSITY, Oxford, Ohio to be used by Miami University as an endowment for the Special Collections Library, for enhancing its holdings.

G. All the rest, residue and remainder of my estate, of whatever nature and wherever situated, which I own at the time of my death, I give, devise and bequeath to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the following uses and purposes and under the following terms and conditions:

(a) I do hereby confer on my Trustee all of the powers which are now or may hereafter be conferred by law upon trustees, and in addition thereto, my said Trustee shall have full power and authority to perform the following.

(b) The income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics. The President of Miami University, Oxford, Ohio, or his or her designee, shall have the sole discretion to determine the nature of said projects, within the guidelines set forth below, and to determine the amounts necessary to fund said projects.

1. Funding and promoting

presentations to members of the general public on the Soviet Union;
2. Funding and promoting classes and presentations to Miami University students and children on various aspects of Soviet life;
3. Funding and promoting study groups and classes for Miami University students and adults on Soviet-American relations and contemporary Soviet society;
4. Funding and promoting presentations, seminars, and studies on relations between the governments of the United States and the Soviet Union;
5. Funding and promoting programs and classes dealing with conflict relationships at the international level;
6. Funding and promoting Miami University student, and group trips by members of the Oxford, Ohio community to the Soviet Union through a "sister city" program, according to guidelines set forth by Sister Cities International, Washington, D.C.;
7. Funding and promoting group trips to the Soviet Union to allow Miami University students, Oxford, Ohio citizens, and other Americans to meet and establish direct contact with municipal

officials, industrial workers, educators, students, medical, legal, and other professionals, agriculturalists, and creative artists;

8. To promote and fund exchanges of children's artwork between Soviet and American children and to promote and to fund consultative services to municipalities and groups wishing to establish direct contact with Soviet people and their counterparts;

9. To establish and fund an endowed professorship of Soviet-American Relations at Miami University, Oxford, Ohio.

(c). This trust fund shall be referred to as the WALTER E. HAVIGHURST FUND.

(d). It is contemplated that the trust income and principal, if needed, shall be used, at least initially, to fund and promote the projects listed in (b) above, primarily in Southwestern Ohio and Southeastern Indiana. However, my trustee shall have the authority to fund such projects anywhere in the United States, if they are in keeping with the overall purposes of this trust and if pursuant to instructions given to it by the President of Miami University, Oxford, Ohio.

(e) I request that RUTH NEFF and SAMUEL NEFF, now residing in Richmond, Indiana, by [sic] utilized

as consultants to the President of Miami University, Oxford, Ohio, for the purposes of providing suggestions and advice on ways that the above projects might be accomplished although the ultimate decisions shall remain with said President.

(f) As set forth above, all determinations regarding expenditures of funds shall be made by the President of Miami University, Oxford, Ohio, or his or her designee. My Trustee shall be relieved of any and all liability from or responsibility for the decisions made by said President."

The only substantive change to the Havighurst Will by the October 11, 1983 Codicil was the addition of the following provision under Item III, paragraph C:

"8. "$25,000 to DOROTHY H. KUCERA, now residing at 9310 Hamlin Avenue, Evanston, Illinois 60203, if she survives me."

The value of the specific bequests distributed to both private individuals and charitable and/or educational institutions under Item III of the Havighurst Will totaled approximately $725,000. The bulk of the Havighurst Estate, which after payment of the estate taxes, decedent's debts, and the costs of the administration of decedent's estate was in excess of $4,500,000, has been distributed to the First national Bank of Southwestern Ohio, as Trustee, under the

provisions set forth in Paragraph G of Item III of the Havighurst Will.

The case sub judice is primarily an action for declaratory judgment. Plaintiff has requested the guidance and approval of the court and a declaratory judgment declaring, inter alia, (1) "that the terms of the Charitable Trust, as set out in the Will, create no reversionary interest in the heirs of the Testator," (2) "that the charitable Trust is to be fully funded and carried out, in accordance with its terms," and (3) "that the Trustee, consistent with the charitable intent of the Testator, is authorized by the terms of the Will to provide funding, as otherwise authorized by the Will, for programs related to the U.S.S.R. as it previously existed; for programs related to the people and institutions previously and currently located within areas formerly occupied by the U.S.S.R.; and for other programs coming within the scope of the Charitable Trust as reasonably interpreted by the President of Miami University in the exercise of his or her sole discretion pursuant to the terms of the Charitable Trust."

Defendant/Counterclaimants Alan W. Havighurst and Douglas A. Havighurst have filed their own complaints for declaratory judgment asking that the Court declare, inter alia, (1) "that the putative trust cannot be carried out in accordance with its terms", (2) that the proposed gift of trust must fail and lapse and (3) that "the residuary estate of testator be declared intestate

property and pass according to the provisions of the Statute of Descent and Distribution…"

The portion of the Havighurst Will that is the primary source of controversy in this case is Sub-paragraph (b) of Paragraph G in Item III of the Will. Therein the testator used the following language:

> " (b) The income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics. The President of Miami University, Oxford, Ohio, or his or her designee, shall have the sole discretion to determine the nature of said projects, within the guidelines set forth below, and to determine the amounts necessary to fund said projects." (emphasis added).

To decide the issues raised by the pleadings in the case sub judice the Court must construe the language of the Havighurst Will. A probate court may construe the provisions of a will in a declaratory judgment action. R.C. 2127.03. See also In re Trust of Selsor, 13 Ohio App. 3d 164, 468 N.E. 745 (1983). In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention

of the testator. Such intention must be ascertained from the words contained in the will. Townsend's Executors v. Townsend, et al. (1874), 25 Ohio St. 477; Carr v. Stradley (1977), 52 Ohio St. 2d 220, 371 N.E. 2d 540; American Diabetes Ass'n', Inc. v. Diabetes Soc. Of Clinton Cty., 31 Ohio App. 3d 136, 509 N.E. 2d 84 (1986).

When a term in a will is susceptible to various meanings, the Probate Court may consider the circumstances surrounding the drafting of the instrument in order to arrive at a construction consistent with the overall intent of the testator so as to uphold all parts of the will. Willis v. Union Savings & Trust Co. (1982), 69 Ohio St. 2d 382, 433 N.E.2d 415, American Diabetes, supra. As stated by the Ohio Supreme Court in Holmes v. Hrobon (1953) 158 Ohio St. 508, 110 N.E. 2d 574:

> "If possible, the testator's intention must be determined from the instrument itself. It is, however, well settled that where there is some doubt as to the meaning of the will the Court may admit extrinsic evidence. With such evidence the Court is better able to see things as the testator saw them and to give that construction which he intended." Holmes, supra, 110 N.E. 2d 574, 581.

It has also been stated that whether the will appears ambiguous or not, the Court is entitled to hear such extrinsic evidence of the surrounding circumstances as will put it in the place of the

testator. Until this is done, the Court cannot know whether the will is ambiguous or not. While evidence of surrounding circumstances is admissible to enable the Court to understand the meaning of the words which testator has used in the will, it is not admissible to add to the will provision which cannot fairly be inferred from the language which is used therein, or to take from the will provisions which are clearly expressed therein. See Page, The Law of Wills, Sec. 32.2, page 237. In any case where it is necessary to invoke extrinsic evidence to assist in the construction of a will, it is recognized by the great weight of authority that evidence of the facts and circumstances existing at the time of the execution of the will, and known to the testator, is admissible not to contradict the meaning of the will, but to "enable the court to place itself in the testator's situation, to see things as the saw them, and to apply his language as he understood and intended it." See Page, The Law of Wills, Section 32.8, page 260.

In Subparagraph (b) of Item III, Paragarph G, the testator made reference to the "peoples of the United States of America and the Union of Soviet Socialist Republics" and in the nine subparagraphs that followed, the testator repeatedly used the terms "Soviet" and "Soviet Union. At the time that Walter E. Havighurst executed his Last Will and Testament the "Union of Soviet Socialist Republics" was also referred to as the "Soviet Union" and was one of the largest

nations in the world. In 1987, approximately 284,000,000 people lived in the fifteen Soviet Socialist Republics which then comprised the "Soviet Union". The Republics which made up the Union of Soviet Socialist Republics included the Russian Soviet Federated Socialist Republic, the Ukrainian S.S.R.,[2] the Byelorussian S.S.R., the Uzbek S.S.R., the Kazbah S.S.R., the Georgian S.S.R., the Azerbajan S.S.R., the Lithuanian S.S.R., the Modavian S.S.R., the Latvian S.S.R., the Kirghiz S.S.R., the Tajik S.S.R., the Armenian S.S.R., the Turkem S.S.R., and the Estonian S.S.R. At the time that Walter E. Havighurst executed his Last Will and Testament, twenty-two different "peoples" or ethnic groups with at least one million members or more lived within the fifteen Republics that then comprised the "Union of Soviet Socialist Republics."

In 1991, the "Union of Soviet Socialist Republics" ceased to exist as a political entity. Today, there are still twenty-two different "peoples" or ethnic groups with at least one million members or more living in the same geographical area that was formerly known as the "Union of Soviet Socialist Republics". The former Russian Soviet Federated Socialist Republics is now known as the Russian Federation or Russia. The Ukranian S.S.R. is now known as Ukraine. The former Byelorussian S.S.R. is now known as Belarus. The former Uzbek S.S.R. is now known as Uzbekstan. The

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[2] "S.S.R." is an abbreviation for "Soviet Socialist Republic."

former Kazbah S.S.R. is now known as Kazakhstan. The former Georgian S.S.R. is now known as Georgia. The former Azerbajan S.S.R. is now known as Azerbaijan. The former Lithuanian S.S.R. is now known as Lithuania. The former Moldavian S.S.R. is now known as Moldava. The former Latvian S.S.R. is now known as Latvia. The former Kirghiz S.S.R. is now known as Kyrgyzstan. The former Tajik S.S.R. is now known as Tajikistan. The former Armenian S.S.R. is now known as Armenia. The former Turkem S.S.R. is now known as Turkmenistan. The former Estonian S.S.R. is now known as Estonia.

Eleven of the former SovietSocialist Republics have joined with the Russian Federation to form a political entity known as the Commonwealth of Independent States. Estonia, Latvia and Lithuania have not joined this Commonwealth. Different terms are now used to refer to the geographic area that was once known as the "Soviet Union." Some people refer to this area as "the former Soviet Union." Others refer to this area as the "post Soviet states." Still others refer to this area of the world as the "Newly Independent States." No matter what nomenclature is used, there are still twenty-two different "peoples" or ethnic groups with at least one million members or more living in the same geographical area that was formerly known as the "Union of Soviet Socialist Republics."

Defendant/Counterclaimants Alan W. Havighurst and Douglas A. Havighurst have asserted that because the Soviet Union no

longer exists as a political entity, the trust described in Paragraph G of the Havighurst Will cannot be carried out in accordance with its terms, the proposed gift of trust must fail and lapse and the residuary estate of testator must be declared intestate property and pass to them and their relatives according to the provisions of Ohio's Statute of Descent and Distribution. For a number of reasons the Court disagrees with such assertions.

The Walter E. Havighurst Fund was designed by the testator "to promote and fund educational projects." The language creating the Walter E. Havighurst Fund is found in Paragraph G of the Havighurst Will. Paragraph G is a general residuary clause. The creation of a charitable trust within the language of a residuary clause is not unusual. A much more simplified residuary clause, i.e., "the residue of my estate I give to The Cleveland Trust Company to be devoted to the needy & poor women," was held by the Ohio Supreme Court to create a valid testamentary charitable gift in Palmer v. Oiler (1921) 102 Ohio St. 271, 131 N.E. 362. Gifts in trust for the purposes of education are within the rules governing charitable trusts and are liberally construed. Carrel v. State ex rel. Brown, 11 Ohio App. 281, 30 CC(NS) 161 (1919).

Gifts for charitable purposes have always been favored in equity, and trusts created for such purposes are carried into effect upon broad liberal principles of equity jurisprudence under

circumstances where a purely private trust might fail. Gearhart v. Richardson, (1924), 109 Ohio St. 418, 142 N.E. 890. As noted by the Ohio Supreme Court in Gearhart, supra, many charitable trusts have been construed, and rarely has a trust for charitable purposes been allowed to fail. See Lessee of Bryant v. McCandless, 7 Ohio, pt. 2, 135; Trustees of McIntire Poor School v. Zanesville Canal & Mfg. Co. v. Zanesville, 20 Ohio St., 483; Williams v. First Presbyterian Society in Cincinnati, 1 Ohio St., 478; Landis v. Wooden, 1 Ohio St., 160, 163, 59 Am.Dec., 615; Hullman v. Honcomp, 5 Ohio St., 525; McIntire's Admrs. V. Zanesville, 17 Ohio St., 352; Miller v. Teachout, 24 Ohio St., 525; Bd. Of Ed of Fairfield Twp. V. Ladd, 26 Ohio St. 211; American Traci Society v. Atwater, 30 Ohio St., 77, 27 Am.Rep., 422; Scott v. Trustees of Marion Township, 39 Ohio St., 153; Sowers v. Cyrerius, 39 Ohio St. 29, 48 Am.Rep. 418; Christy v. Commissioners, 41 Ohio St. 711; Mannix, Assignee, v. Purcell, 46 Ohio St. 102, 19 N.E., 572, 2 L.R.A., 753, 15 Am St. Rep., 562; Palmer v. Oiler, Exrx., 102 Ohio St., 271, 131 N.E.,362. In all the above cases charitable trusts have been sustained.

Since Gearhart, supra, was decided, Ohio courts have continued to sustain the validity of charitable trusts. See American Diabetes Association, Inc. v. Diabetes Society of Clinton County, 31 Ohio App. 3d 136, 139, 509 N.E.2d 84 (1986); First National Bank of Akron, Trustee, v. Unknown Heirs of Donnelly,

Jr., et al., 96 Ohio App. 509, 122 N.E. 2d 672 (1954); Craft v. Shroyer, 81 Ohio App. 253, 74 N.E. 2d 589 (1947); Heinlein v. The Elyria Savings & Trust Co., Exr. and Trustee, 75 Ohio App. 353, 62 N.E. 284 (1945); City of Springfield, Trustee v. Patterson, 26 Ohio Misc. 242, 270 N.E. 2d 683 (1970); and Fenn College, et al v. Nance, et al., 4 Ohio Misc. 183, 210 N.E.2d 418 (1965).

Walter E. Havighurst was a charitable person. He had an affinity for Miami University, a school at which he had served for many years as a distinguished member of the faculty. Dr. Havighurst was interested in education. The terms of his Will reflect his nature and interests. After making specific bequests to his nieces and nephews of what most people would regard as a substantial sum of money, he provided that "all the rest, residue and remainder of my estate, of whatever nature and wherever situation, which I own at the time of my death," he left in a trust to be known as the Walter E. Havighurst Fund. His purpose in creating the trust was a charitable one. The Court finds that the Walter E. Havighurst fund is a charitable trust as that term has been construed by the Courts of Ohio.

In reviewing the terms of a testamentary charitable trust to determine the overall intent of the testator, a probate court must examine the language of the charitable trust to see what the testator intended to be accomplished by the administration of the charitable trust. The language of the

Havighurst Will clearly reflects that the testator intended that the trust funds be used to promote and fund educational projects for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialists Republics. The testator set forth nine (9) guidelines for carrying out this intent. The guidelines describe the types of educational projects that the testator wanted the Walter E. Havighurst Fund to promote and fund.

The probate court must also examine the language of the charitable trust to see who the testator intended to benefit through the administration of the charitable trust. In the case sub judice the language of the Havighurst Will clearly reflects that the testator intended that Miami University, Oxford, Ohio be a member of the class of beneficiaries of the Walter E. Havighurst Fund. Subparagraph 9 of Paragraph G(b) of the Havighurst Will provides that the projects to be supported by the Havighurst Fund may include the establishment of an endowed professorship at Miami University. Miami University students were also named by the testator as members of the class of intended beneficiaries of the Havighurst Fund. Within his guidelines for educational projects, the testator listed, inter alia, classes, study groups, and presentations for Miami University students and even included group trips to the Soviet Union for Miami University students.

The Court finds that the continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics" was not intended by the testator to be an integral factor in the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund. The testator's primary purpose in establishing this charitable trust was to fund and promote education and more particularly to fund and promote educational projects that would help build cross-cultural understanding between the "peoples" of the United States of America and what was known in 1988 as the Union of Soviet Socialist Republics. The Court further finds that the testator intended the terms "Union of Soviet Socialist Republics," "Soviet Union," and "Soviet" to primarily be descriptive of the "peoples" that inhabited that area of the world. The fact that the "Union of Soviet Socialist Republics" no longer exists as a political entity is of no importance in carrying out the terms of this charitable trust in accordance with the intent of the testator. The "peoples" still exist. The need for education still exists. The need for cross-cultural understanding between the "peoples" of the United States and the "peoples" still living in the same geographical area that was formerly known as the "Soviet Union" still exists. Miami University still exists. Miami University students still exist. The other classes of persons that the testator intended to be benefited by the Havighurst Fund still exist. The

testator never intended that his residuary estate pass by the laws of intestate succession in the event that the political entity known as the "Soviet Union" dissolved.

Defendants/Counterclaimants Alan W. Havighurst and Douglas A. Havighurst have also asserted that because no formal "Miami University International Center" currently exists, the trust described in Paragraph G of the Havighurst Will cannot be carried out in accordance with its terms, the proposed gift of trust must fail and lapse and the residuary estate of testator must be declared intestate property. The court finds this contention to be without merit.

On September 7, 1988 and on October 11, 1989 when Walter E. Havighurst executed his Last Will and Testament and codicil, respectively, the administration of Miami University was in the process of developing an Office of International Programs at Miami University, Oxford, Ohio. Prior to establishing an Office of International Programs, Miami University had a Director of International Student Services. During 1989, Miami University hired a Director for its Office of International Programs. During this time period the physical center of international activities at Miami University was located at Langstroth Cottage on the Miami University campus in Oxford, Ohio. Throughout the late 1980's the overall academic plan of Miami University included the continued development of the University's International program and included the

development of the Office of International Programs and an International Center at Miami University. Within the University community the Office of International Programs is sometimes referred to as the "International Center."

In the case sub judice the testator provided that "the income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio…" The reference to the "Miami University International Center" is administrative in nature. The terms of the Will create no substantive duties and delegate no powers to the "Miami University International Center." The testator named the First National Bank of Southwestern Ohio as the Trustee of the Walter E. Havighurst Fund and delegated specific powers. The Trustee will be held legally accountable as a fiduciary under the law of Ohio. Under Sub-paragraph (b) of Item III, Paragraph G, the testator gave the President of Miami University, Oxford, Ohio, or his or her designee, sole discretion to determine the nature of the educational projects, within the guidelines set forth in the Havighurst Will. Under Sub-paragraph (e) of Item III, Paragraph G, the testator requested that Ruth Neff and Samuel Neff be utilized as consultants to the President of Miami University for purposes of providing suggestions and advice.

Even if the form of the charitable

trust created by the Havighurst Will was an outright bequest to the "Miami University International Center", which it is not, the charitable trust would not fail simply because no formal "Center" existed at the time of the testator's death. A charitable organization may come into existence after a will has been probated and receive a charitable bequest under the will if such will permits the decedent's intent to be realized and carried out. Where a will includes a bequest to a charitable organization not yet in existence at the time of the execution of the will or of its probating, there is nevertheless an immediate gift for charitable purposes upon the testator's death, and if the organization is formed within a reasonable time thereafter, it is entitled to receive the bequest. American Diabetes Ass'n. Inc. v. Diabetes Soc. Of Clinton Cty. (1986), 31 Ohio App. 3d 136, 509 N.E.2d 84 (1986). See also Rice v. Stanley (1975) 42 Ohio St. 209, 327 N.E.2d 774.

To accomplish the purpose of a charitable trust and to effectuate its administration, a court of equitable jurisdiction will direct or permit a trustee to deviate from a term of the trust, if it appears to the court that compliance with the letter of the instrument of creation is impossible. First National Bank of Akron, Trustee, v. Unknown Heirs of Donnelly, Jr. et al., 96 Ohio App. 509, 122 N.E.2d 672 (1954).Where the creator of a testamentary charitable trust has made no

provision for forfeiture, or has not made an alternate bequest in the event that a strict compliance with the letter of his will is impossible, an inference may be drawn that the testator did not intend that the gift to charity should fail, but on the contrary intended that if the carrying out of his dominant purpose was possible by varying the means and methods prescribed, a deviation should be allowed, to meet circumstances arising from time to time during the existence of the trust. First National Bank of Akron, supra. See also In re Farren, 27 Ohio App. 2d 31, 272 N.E. 2d 162 (1970).

After reviewing the terms of the Havighurst Will in its entirety and taking into account the extrinsic evidence admitted at trial concerning the existence of the Office of International Programs that existed at Miami University at the time the testator executed his Will, this Court finds that the testator intended the reference to the "Miami University International Center" in Sub-paragraph (b) of Item III, Paragraph G, to mean the "Miami University International Center" or the "Office of International Programs at Miami University" and the Havighurst Will may be construed in that manner. If such a construction were not proper, this Court would not hesitate to apply the doctrine of deviation to arrive at the same result.

With respect to the issues of construction raised by the demise of the political entity formerly known as the

"Soviet Union," the Court is aware that in addition to the doctrine of deviation, another doctrine exists, i.e., the doctrine of *cy pres*, which, if applicable, would keep this charitable trust from failing. The doctrine of *cy pres* operates in the field of charitable trusts and is a rule of judicial construction. In a charitable trust, where the court finds that the settlor manifested a general intention to give to charity, and it is impracticable or inexpedient to carry out the terms of the trust, the court will execute the purpose of the settlor as nearly as it can, according to the original plan, under the doctrine of *cy pres*. See Craft v. Shroyer, 81 Ohio App. 253, 74 N.E.2d 589 (1947). As stated in the Restatement of the Law of Trusts:

> "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." Restatement of the Law of Trusts, Section 399.

See also First National Bank of Akron,

Trustee, v. Unknown Heirs of Donnelly, Jr., et al., 96 Ohio App. 509, 122 N.E. 2d 672 (1954).

If the primary purpose of a charitable trust can be accomplished by deviation from express terms in the instrument of creation, in respect to purely administrative matters, it becomes unnecessary to analyze the facts in the light of the doctrine of *cy pres*, and, in doing the latter, determine whether the donor manifested a general charitable intent, and if so, whether the property should be used for an approximate charitable purpose (a purpose as nearly as may be like the purpose stated by the donor) when it is impossible to exactly carry out his specific intent. See: 3 Scott on Trusts, Section 399; 2A Bogert on Trusts and Trustees, Section 441; Heinlein v. Elyria Savings & Trusts Co., Exr. & Trustee, 75 Ohio App.353, 62 N.E.2d 284; First National Bank of Akron, Trustee, supra.

In the case sub judice the court finds that the testator manifested a general charitable intention to devote his residuary estate to charitable purposes.Since the Court has previously found that the continued existence of the political entity formerly known as the Union of Soviet Socialist Republics was not intended by the testator to be an integral factor in the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund, the court does not finds that it is impossible or impracticable or illegal to carry out the

particular purpose of the charitable trust created by the Havighurst Will.

The Court further finds that since the testator intended the terms "Union of Soviet Socialist Republics", "Soviet Union," and "Soviet", as used in his Last Will and Testament, to primarily be descriptive of the "peoples" that inhabited that geographical area of the world, and the Havighurst Will may be construed in that manner. Within the intent of the testator, the term "Union of Soviet Socialist Republics" may be construed in that manner. Within the intent of the testator, the term "Union of Soviet Socialist Republics" may be construed to also mean "former Union of Soviet Socialist Republics," and the term "Soviet Union" may also be construed to mean "former Soviet Union." Therefore this Court does not find it necessary to apply the doctrine of *cy pres*. If such construction of those terms were not proper, this Court would not hesitate to apply either the doctrine of deviation of the doctrine of *cy pres* to uphold the charitable trust created by the testator.

In its complaint, Plaintiff sought a declaration that the terms of the charitable trust, as set out in the Will, creates no reversionary interest in the heirs of the testator. No such reversionary interest is expressed in the terms of the Havighurst Will. The testator's heirs could only have a reversionary interest in the trust estate if the charitable trust failed and the doctrines of deviation or *cy pres* could not save the trust. A testator is never

presumed to have died intestate as to any part of his estate to which his attention was seemingly directed. Carr v. Stradley (1977), 52 Ohio St. 2d 220, 371 N.E.2d 540. In the case sub judice the Court has already stated that it if it becomes impossible or impracticable or illegal to carry out the particular purpose of this charitable trust, the Court would not hesitate to apply either the doctrine of deviation or *cy pres* to carry out the general charitable intent of the testator. Under these circumstances the heirs of the testator have no reversionary interest in the trust estate.

Before concluding this Opinion the Court would like to point out to the parties that the residuary clause of the Havighurst Will creates a charitable trust to be administered according to the terms set forth and subject to the general jurisdiction of the Probate Court. The named Trustee is the First National Bank of Southwestern Ohio. Miami University is not the Trustee. The Miami University International Center or the Office of International Programs at Miami University is not the Trustee. The President of Miami University is not the Trustee. The testator gave the President of Miami University the sole discretion, within the enumerated guidelines, to select the educational projects that would be funded and promoted by the Havighurst Fund. However, implicit in the method of administration chosen by the testator is the general oversight of

the Trustee. As a fiduciary, the Trustee should conduct itself accordingly.

In accordance with the Opinion of this Court, it is therefore

ORDERED, ADJUDGED AND DECREED that the trust created by the provisions of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst shall be construed to also mean "former Union of Soviet Socialist Republics", and the term "Soviet Union" as used in the Last Will and Testament of Walter E. Havighurst shall also be construed to mean "former Soviet Union," and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the term "Miami University International Center" as used in Sub-paragraph (b) of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst shall be construed to mean the "Miami University International Center" or the "Office of International Programs at Miami University," and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the charitable trust created by the provisions of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst be fully funded and carried out in accordance with its terms and the Executor of the Estate of Walter E. Havighurst is hereby authorized and directed to distribute the residuary of the Havighurst estate to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the uses and purposes set forth in Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the terms of the charitable trust, as set out in the Last Will and Testament of Walter E.Havighurst, create no reversionary interest in the heirs of Walter E. Havighurst, and it is

FURTHER ORDERED, ADJUDGED and DECREED that the Amended Counterclaim filed by the Defendant, Alan W. Havighurst, is dismissed, and it is

FURTHER ORDERED, ADJUDGED and decreed that the Amended Counterclaim filed by the Defendant, Douglas A. Havighurst, is dismissed, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, as the Executor of the Estate of Walter E. Havighurst shall pay the costs of this action.

Dated:
December 15, 1995 /s/ Randy T. Rogers,
Judge

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
BUTLER COUNTY, OHIO

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	*	CASE NO. 94-0175
	*	Judge Randy T. Rogers
PLAINTIFF		
VS.	*	
MIAMI UNIVERSITY, ET AL.	*	FINDINGS OF FACT AND CONCLUSIONS OF LAW
DEFENDANTS	*	

* * * * * * * * * * *

FINDINGS OF FACT

1. Walter E. Havighurst died on February 3, 1994 at the age of ninety-three (93).

2. On September 7, 1988, Walter E. Havighurst executed his Last Will and Testament.

3. A Codicil to the Last Will and Testament of Walter E. Havighurst dated September 7, 1988 was executed by Walter E. Havighurst on October 11, 1989.

4. Item III of the Havighurst Will provided, *inter alia:*

> "ITEM III. A. I give and devise all of the real property I may own, or have an interest in at the time of my death, to MIAMI UNIVERSITY, Oxford, Ohio. This bequest is unrestricted and the Board of Trustees may use and expend the same for the benefit of the

University in any manner it deems appropriate.

B. To the individuals and institutions listed below, I give and bequeath the following:

1. To MIAMI UNIVERSITY, Oxford, Ohio any and all books owned by me at my death;

2. To MIAMI UNVIERSITY, Oxford, Ohio all of my papers, letters, manuscripts, and other items of literary interest. It is my desire that such items be placed in THE KING LIBRARY of MIAMI UNIVERSITY.

3. To SAMUEL NEFF, now residing in Richmond, Indiana, if he survives me, any automobile, typewriters, and luggage, owned by me at my death.

4. To MIAMI UNVIERSITY, Oxford, Ohio, my Hodgin painting of Fisher Hall, presently hanging in my study, if owned by me at my death. It is my desire that said painting be placed in the Joseph M. Bachelor Room of Bachelor Hall, Miami University, Oxford, Ohio.

5. To my niece, RUTH NEFF,now residing in Richmond, Indiana, if she survives me, all furniture, appliances, rugs, draperies, silver, china, crystal, art objects, decorative pieces, and all other furnishings and items for household use, located in my residence at the time of my death.

6. To GOODWILL INDUSTRIES,all men's clothing which I own at the time of my death.

C. I give and bequeath to each of the following individuals as follows:

1. $100,000 to my sister, Mrs. MIRIAM HAVIGHUST JOHNSON, if she survives me;

2. $25,000 to BRUCE J. HAVIGHURST, now residing at 20861 Byron Road, Shaker Heights, Ohio 44122, if he survives me;

3. $25,000 to DOUGLAS A. HAVIGHURST, now residing at 1151 Haselton Road, Shaker Heights, Ohio 44121, if he survives me.

4. $25,000 to ALLAN W. HAVIGHURST, now residing at 3071 Huntington Road, Shaker Heights, Ohio 44120, if he survives me;[1]

5. $25,000 to WALTER E. HAVIGHURST, now residing at 338 West 47 Street, New York, New York, 10024, if he survives me;

6. $25,000 to JAMES P. HAVIGHURST, now residing at 52 Rapaki Road, Christchurch, New Zealand, if he survives me.

7. $25,000 to RUTH NEFF, now residing at 329 SW First Street, Richmond, Indiana 47374, if she survives me;

D. I give and bequeath to my niece, HELEN BERK, now residing at 2301 Cheryl Drive, Jacksonville, Florida 32017, if she survives me, the sum of

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[1] The name and address of Alan W. Havighurst were corrected in the October 11, 1989 Codicil to the Havighurst Will.

$5,000.000.

E. If DOUGLAS A. WILSON and SUSAN WILSON, or either of them or their estates, or their beneficiaries thereof, should be indebted to me at my death, as evidenced by a note and a second mortgage executed by them and delivered to me, in the face amount of $50,000, or any renewals thereof, I direct and require that all of such indebtedness and all interest thereon be forgiven and cancelled in its entirely, it being my intention by the bequest to relieve said DOUGLAS O. WILSON and SUSAN WILSON, or either of them, or their estates, or their beneficiaries thereof of any obligation to repay said indebtedness, or any part thereof, or any interest thereon.

F. I give and bequeath the sum of $250,000 to MIAMI UNIVERSITY, Oxford, Ohio to be used by Miami University as an endowment for the Special Collections Library, for enhancing its holdings.

G. All the rest, residue and remainder of my estate, of whatever nature and wherever situated, which I own at the time of my death, I give, devise and bequeath to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the following uses and purposes and under the following terms and conditions:

(a) I do hereby confer on my Trustee all of the powers which are now or may hereafter be conferred by law upon

trustees, and in addition thereto, my said Trustee shall have full power and authority to perform the following.....[2]

(b) The income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics. The President of Miami University, Oxford, Ohio, or his or her designee, shall have the sole discretion to determine the nature of said projects, within the guidelines set forth below, and to determine the amounts necessary to fund said projects.

1. Funding and promoting presentations to members of the general public on the Soviet Union;

2. Funding and promoting classes and presentations to Miami University students and children on various aspects of Soviet life;

3. Funding promoting study groups and classes for Miami University students and adults on Soviet-

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[2]Subparagraphs G(a)(1)-(a)(12) containing the administrative powers of the Trustee have not been reproduced as part of these Findings of Fact and Conclusions of Law. They may be found in their entirety in Plaintiff Exhibit 1.

American relations and contemporary Soviet society;

4. Funding and promoting presentations, seminars, and studies on relations between the governments of the United States and the Soviet Union;

5. Funding and promoting programs and classes dealing with conflict relationships at the international level;

6. Funding and promoting Miami University student, and group trips by members of the Oxford, Ohio community to the Soviet Union through a "sister city" program, according to guidelines set forth by Sister Cities International, Washington, D.C.;

7. Funding and promoting group trips to the Soviet Union to allow Miami University students, Oxford, Ohio citizens, and other Americans to meet and establish direct contact with municipal officials, industrial workers, educators, students, medical, legal, and other professionals, agriculturalists, and creative artists;

8. To promote and fund exchanges of children's artwork between Soviet and American children and to promote and to fund consultative services to municipalities and groups wishing to establish direct contact with Soviet people and their counterparts;

9. To establish and fund an endowed professorship of Soviet-American Relations at Miami University, Oxford, Ohio.

(c). This trust fund shall be referred to as the WALTER E. HAVIGHURST FUND.

(d). It is contemplated that the trust income and principal, if needed, shall be used, at least initially, to fund and promote the projects listed in (b) above, primarily in Southwestern Ohio and Southeastern Indiana. However, my trustee shall have the authority to fund such projects anywhere in the United States, if they are in keeping with the overall purposes of this trust and if pursuant to instructions given to it by the President of Miami University, Oxford, Ohio.

(e). I request that RUTH NEFF and SAMUEL NEFF, now residing in Richmond, Indiana, by [sic] utilized as consultants to the President of Miami University, Oxford, Ohio, for the purposes of providing suggestions and advice on ways that the above projects might be accomplished although the ultimate decisions shall remain with said President.

(f). As set forth above, a [sic] determinations regarding expenditures of funds shall be made by the President of Miami University, Oxford, Ohio, or his or her designee. My Trustee shall be relieved of any and all liability from or responsibility for the decisions made by said President."

5. The only substantive change to the Havighurst Will by the October 11, 1983 Codicil was the addition of the following provision under Item III, paragraph C:

"8. "$25,000 to DORTHY H.

KUCERA, now residing at 9310 Hamlin Avenue, Evanston, Illinois 60203, if she survives me."

6. Walter E. Havighurst served over a period of many years as a distinguished member of the faculty of Miami University, Oxford, Ohio.

7. Walter E. Havighurst was a charitable person.

8. During the years 1988 and 1989 Walter E. Havighurst made substantial charitable contributions. His 1988 Federal income tax return (Form 1040) reflected charitable contributions of $25,000 during 1988 and his 1989 Federal income tax return (Form 1040) reflected charitable contributions of $68,836 during 1989.

9. Throughout his adult life, Walter E. Havighurst had an affinity for Miami University, Oxford, Ohio.

10. In his Last Will and Testament dated September 7, 1988, Walter E. Havighurst named Miami University, Oxford, Ohio as the devisee of all real property which he owned, or had an interest in at the time of his death. Pursuant to this provision, Miami University received the Havighurst residence located at 163 Shadowy Hills Drive, Oxford, Ohio which was valued at $194,000 at the time of Dr. Havighurst's death.

11. In addition to the devise of real estate and bequests of certain tangible personal property, Walter E. Havighurst also bequeathed the sum of $250,000 to Miami University.

12. When Walter E. Havighurst died, was a widower, and left no issue then surviving.

13. Walter E. Havighurst made special bequests in his Last Will and Testament totaling more than $250,000 to his nieces, nephews and other named individuals.

14. On September 7, 1988 and on October 11, 1989 when Walter E. Havighurst executed his Last Will and Testament and Codicil, respectively, the administration of Miami University was in the process of developing an Office of International Programs at Miami University, Oxford, Ohio.

15. Prior to establishing an Office of International Programs, Miami University had a Director of International Student Services.

16. During 1989, Miami University hired a Director for its Office of International Programs.

17. On September 7, 1988 and on October 11,1989, the physical center of international activities at Miami University was located at Langstroth Cottage located on the Miami University campus in Oxford, Ohio.

18. Throughout the late 1980's the overall academic plan of Miami University included the continued development of the University's international programs and included the development of the Office of International Programs and an International Center at Miami University. Within the University community the Office of International Programs was sometimes informally referred to as the "International Center."

19. On September 7, 1988 and on October 11, 1989 when Walter E. Havighurst executed his Last Will and Testament and Codicil, respectively, the administration of Miami

University, Oxford, Ohio had an established plan which included the development of an Office of International Programs and International Center at Miami University.

20. Throughout 1988 and 1989 there existed a nation known as the "Union of Soviet Socialist Republics" ("U.S.S.R."), and also referred to as the "Soviet Union."

21. In 1987, approximately 284,000,000 people lived in the fifteen Soviet Socialist Republics which then comprised the Soviet Union.

22. On September 7, 1988 and on October 11, 1989 when Walter E. Havighurst executed his Last Will and Testament and Codicil, respectively, the fifteen Soviet Socialist Republics which made up the Union of Soviet Socialist Republics included the Russian Soviet Federated Socialist Republic, the Ukrainian S.S.R.,[3] the Byelorussian S.S.R., the Uzbek S.S.R., the Kazbah S.S.R., the Georgian S.S.R., the Azerbajan S.S.R., the Lithuanian S.S.R., the Modavian S.S.R., the Latvian S.S.R., the Kirghiz S.S.R., the Tajik S.S.R., the Armenian S.S.R., the Turkem S.S.R., and the Estonian S.S.R.

23. On September 23, 1988 and on October 11, 1989 when Walter E. Havighurst executed his Last Will and Testament and Codicil, respectively, twenty two different "peoples" or ethnic groups with at least one million members or more lived in the Union of Soviet Socialist Republics.

24. In 1991, the "Union of Soviet Socialist Republics" ceased to exist as a

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[3] "S.S.R." is an abbreviation for "Soviet Socialist Republic."

political entity. Today, there are still twenty-two different "peoples" or ethnic groups with at least one million members or more living in the same geographical are that was formerly known as the "Union of Soviet Socialist Republics". The former Russian Soviet Federated Socialist Republics is now known as the Russian Federation or Russia. The Ukrainian S.S.R. is now known as Ukraine. The former Byelorussian.S.R. is now known as Belarus. The former Uzbek S.S.R. is now known as Uzbekstan. The former Kazbah S.S.R. is now known as Kazakhstan. The former Georgian S.S.R. is now known as Georgia. The former Azerbajan S.S.R. is now known as Azerbaijan. The former Lithuanian S.S.R. is now known as Lithuania. The former Moldavian S.S.R. is now known as Moldava. The former Latvian S.S.R. is now known as Latvia. The former Kirghiz S.S.R. is now known as Kyrgyzstan. The former Tajik S.S.R. is now known as Tajikistan. The former Armenian S.S.R. is now known as Armenia. The former Turkem S.S.R. is now known as Turkmenistan. The former Estonian S.S.R. is now known as Estonia.

25. Eleven of the former Soviet Socialist Republics have joined with the Russian Federation to form a political entity known as the Commonwealth of Independent States. Estonia, Latvia and Lithuania have not joined this Commonwealth. Different terms are now used to refer to the geographic area that was once known as the "Soviet Union." Some people refer to this area as "the former Soviet Union." Others refer to this area

as the "post Soviet states." Still others refer to this area of the world as the "Newly Independent States."

26. The continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics was not intended by the testator to be an integral factor in the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund.

27. The primary purpose of Walter E. Havighurst in establishing the charitable trust was to fund and promote education and more particularly to fund and promote educational projects that would help build cross-cultural understanding between the "peoples" of the United States of America and what was known in 1988 as the Union of Soviet Socialist Republics.

28. Walter E. Havighurst intended the terms "Union of Soviet Socialist Republics," "Soviet Union", and "Soviet", as those terms were used in his Last Will and Testament, to primarily be descriptive of the "peoples" that inhabited that area of the world.

29. The fact that the "Union of Soviet Socialist Republics" no longer exists as a political entity is of no importance in carrying out the terms of the trust in accordance with the intent of the [sic] Walter E. Havighurst

30. Walter E. Havighurst intended the reference to the "Miami University International Center" in Sub-paragraph (b) of Item III, Paragraph G, of his Will, to mean the "Miami University International

Center" or the "Office of International Programs at Miami University."

CONCLUSIONS OF LAW

1. A probate court may construe the provisions of a will in a declaratory judgment action. R.C. 2127.03. See also In re Trust of Selsor, 13 Ohio App. 3d 164, 468 N.E. 745 (1983).

2. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator. Such intention must be ascertained from the words contained in the will. Townsend's Executors v. Townsend, et al. (1874), 25 Ohio St. 477; Carr v. Stradley (1977), 52 Ohio St. 2d 220, 371 N.E. 2d 540; American Diabetes Ass'n', Inc. v. Diabetes Soc. Of Clinton Cty., 31 Ohio App. 3d 136, 509 N.E. 2d 84 (1986).

3. When a term in a will is susceptible to various meanings, the Probate Court may consider the circumstances surrounding the drafting of the instrument in order to arrive at a construction consistent with the overall intent of the testator so as to uphold all parts of the will. Willis v. Union Savings & Trust Co. (1982) 69 Ohio St. 2d 382, 433 N.E. 2d 415, American Diabetes, supra. Whether the will appears ambiguous or not, the Court is entitled to hear such extrinsic evidence of the surrounding circumstances as will put it in the place of the testator. Until this is done, the Court cannot know whether the will is ambiguous or not. While evidence of

surrounding circumstances is admissible to enable the Court to understand the meaning of the words which testator has used in the will, it is not admissible to add to the will provision which cannot fairly be inferred from the language which is used therein, or to take from the will provisions which are clearly expressed therein. See Page, The Law of Wills, Sec. 32.2, page 237.

5. In any case where it is necessary to invoke extrinsic evidence to assist in the construction of a will, it is recognized by the great weight of authority that evidence of the facts and circumstances existing at the time of the execution of the will, and known to the testator, is admissible not to contradict the meaning of the will, but to "enable the court to place itself in the testator's situation, to see things as the saw them, and to apply his language as he understood and intended it." See Page, The Law of Wills, Section 32.8, page 260.

Gifts in trust for the purposes of education are within the rules governing charitable trusts and are liberally construed. Carrel v. State ex rel. Brown, 11 Ohio App. 281, 30 CC(NS) 161 (1919).

7. Gifts for charitable purposes have always been favored in equity, and trusts created for such purposes are carried into effect upon broad liberal principles of equity jurisprudence under circumstances where a purely private trust might fail. Gearhart v. Richardson, (1924), 109 Ohio St. 418, 142 N.E. 890.

8. The trust created by the provisions of Item III, Paragraph G of the

Last Will and Testament of Walter E. Havighurst is a charitable trust under the law of the State of Ohio.

9. The language of the Havighurst Will clearly reflects that the testator intended that Miami University, Oxford, Ohio be a member of the class of beneficiaries of the Walter E. Havighurst Fund.

10. The continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics" was not intended by the testator to be an integral factor in the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund.

11. The testator's primary purpose in establishing this charitable trust was to fund and promote education and more particularly to fund and promote educational projects that would help build cross-cultural understanding between the "peoples" of the United States of America and what was known in 1988 as the Union of Soviet Socialist Republics.

12. The testator intended the terms "Union of Soviet Socialist Republics, "Soviet Union", and "Soviet" to primarily be descriptive of the "peoples" that inhabited that area of the world.

13. The fact that the "Union of Soviet Socialist Republics" no longer exists as a political entity is of no importance in carrying out the terms of this charitable trust in accordance with the intent of the testator.

14. A charitable organization may

come into existence after a will has been probated and receive a charitable bequest under the will if such will permits the decedent's intent to be realized and carried out. Where a will includes a bequest to a charitable organization not yet in existence at the time of the execution of the will or of its probating, there is nevertheless an immediate gift for charitable purposes upon the testator's death, and if the organization is formed within a reasonable time thereafter, it is entitled to receive the bequest. American Diabetes Ass'n. Inc. v. Diabetes Soc. Of Clinton Cty. (1986), 31 Ohio App. 3d 136, 509 N.E.2d 84 (1986). See also Rice v. Stanley (1975) 42 Ohio St. 209, 327 N.E.2d 774.

15. To accomplish the purpose of a charitable trust and to effectuate its administration, a court of equitable jurisdiction will direct or permit a trustee to deviate from a term of the trust, if it appears to the court that compliance with the letter of the instrument of creation is impossible. First National Bank of Akron, Trustee, v. Unknown Heirs of Donnelly, Jr. et al., 96 Ohio App. 509, 122 N.E.2d 672 (1954).

16. Where the creator of a testamentary charitable trust has made no provision for forfeiture, or has not made an alternate bequest in the event that a strict compliance with the letter of his will is impossible, an inference may be drawn that the testator did not intend that the gift to charity should fail, but on the contrary intended that if the carrying out

of his dominant purpose was possible by varying the means and methods prescribed, a deviation should be allowed, to meet circumstances arising from time to time during the existence of the trust. First National Bank of Akron, supra. See also In re Farren, 27 Ohio App. 2d 31, 272 N.E. 2d 162 (1970).

17. Walter E. Havighurst intended the reference to the "Miami University International Center" in Sub-paragraph (b) of Item III, Paragraph G, of his Will, to mean the "Miami University International Center" or the "Office of International Programs at Miami University" and the Havighurst Will may be construed in that manner.

18. The doctrine of cy pres operates in the field of charitable trusts and is a rule of judicial construction. In a charitable trust, where the court finds that the settlor manifested a general intention to give to charity, and it is impracticable or inexpedient to carry out the terms of the trust, the court will execute the purpose of the settlor as nearly as it can, according to the original plan, under the doctrine of cy pres. See Craft v. Shroyer, 81 Ohio App. 253, 74 N.E.2d 589 (1947).

19. If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will

direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." Restatement of the Law of Trusts, Section 399. See also First National Bank of Akron, Trustee, v. Unknown Heirs of Donnelly, Jr., et al, 96 Ohio App. 509, 122 N.E. 2d 672 (1954).

20. If the primary purpose of a charitable trust can be accomplished by deviation from express terms in the instrument of creation, in respect to purely administrative matters, it becomes unnecessary to analyze the facts in the light of the doctrine of cy pres, and, in doing the latter, determine whether the donor manifested a general charitable intent, and if so, whether the property should be used for an approximate charitable purpose (a purpose as nearly as may be like the purpose stated by the donor) when it is impossible to exactly carry out his specific intent. See: 3 Scott on Trusts, Section 399; 2A Bogert on Trusts and Trustees, Section 441; Heinlein v. Elyria Savings & Trusts Co., Exr.& Trustee, 75 Ohio App.353, 62 N.E.2d 284; First National Bank of Akron, Trustee, supra.

21. The language of the Havighurst Will manifested a general charitable intention on the part of the testator to devote his residuary estate to charitable purposes.

22. Walter E. Havighurst intended the terms "Union of Soviet Socialist Republics", "Soviet Union," and "Soviet", as used in his Last Will and Testament, to

primarily be descriptive of the "peoples" that inhabited that geographical area of the world, and the Havighurst Will may be construed in that manner. Within the intent of the testator, the term "Union of Soviet Socialist Republics" may be construed in that manner. Within the intent of the testator, the term "Union of Soviet Socialist Republics" may be construed to also mean "former Union of Soviet Socialist Republics," and the term "Soviet Union" may also be construed to mean "former Soviet Union."

23. It is not impossible or impracticable or illegal to carry out the particular purpose of the charitable trust created by the Havighurst Will.

24. The heirs of the Walter E. Havighurst have no reversionary interest in the trust estate.

Dated: February 21, 1996

/s/ Randy T.Rogers,
Judge

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
BUTLER COUNTY, OHIO

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E. HAVIGHURST	*	*Case No. 94-0175 Judge Randy Rogers
Plaintiff	*	
vs.	*	AMENDED JUDGMENT ENTRY OF DECLARATORY JUDGEMENT FINAL APPEALABLE ORDER
MIAMI UNIVERSITY, ET AL.	*	
Defendants		

* * * * * * *

On December 15, 1995 this Court filed an Opinion and Judgment Entry of Declaratory Judgment. On December 26, 1995, Defendants, Alan W. Havighurst and Douglas A. Havighurst, each filed a Request for Findings of Fact and Conclusions of Law pursuant to Civ. R. 52.

As stated by the Twelfth District Court of Appeals in Abney v. W. Res. Mut. Cas. Co., 76 Ohio App. 3d 421 (1991), Civ. R. 52 provides:

> "When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days

> after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.
>
> * * *
>
> An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and rule 41(B)."

The trial court in Abney, supra, overruled appellants' motion for findings of fact and conclusions of law, stating that its written decision "was a complete statement of the court's findings and conclusions and fully complies with the final paragraph of Civ. R. 52." The Court of Appeals upheld the trial court in Abney.

The purpose of separately stated findings of fact and conclusions of law is to enable a reviewing court to determine the existence of assigned error. Davis v. Wilkerson, 29 Ohio App. 3d 100 (1986). If the court's ruling or opinion, together with other parts of the trial court's record, provides an adequate basis upon which an appellate court can decide the legal issues presented, there is such substantial compliance with Civ. R. 52. Stone v. Davis (1981) 66 Ohio St. 2d 74.

Although this Court believes that the fifteen (15) page opinion previously filed in the case sub judice sufficiently sets forth the basis of this court's ruling, the court has on this date filed herein its separately stated Findings of Fact and Conclusions of Law in response to the requests of the Defendants, Alan W. Havighurst and Douglas Havighurst.

The Court also notes that the original Opinion did contain a typographical error in that this matter did come before the Court for trial on September 5 and September 6, 1995 and not September 4, 1995, as incorrectly typed in the original Opinion. Pursuant to Civ. R. 60(A) the Court does hereby correct the Opinion and Judgment entry filed herein on December 16, 1995. In all other respects the court's Opinion and Judgment remain the same and are incorporated herein by reference.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the trust created by the provisions of Item III, Paragraph G of the Last Will and Testament of Walter E.Havighurst is hereby declared to be a charitable trust under the law of the State of Ohio, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the term "Union of Soviet Socialist Republic" as used in the Last Will and Testament of Walter E. Havighurst shall be construed to also mean "former Union of Soviet Socialist Republics", and the term "Soviet Union" as used in the Last Will and Testament of Walter E. Havighurst shall also be construed to mean "former Soviet

Union," and it is

FURTHER ORDERED, ADJUDGED AND DECREED THAT THE TERM "Miami University International Center" as used in Sub-paragraph (b) of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst shall be construed to mean the "Miami University International Center" or the "Office of International Programs at Miami University," and it is

FURTHER ORDERED, ADJUDGED AND DECREED That the charitable trust created by the provisions of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst be fully funded and carried out in accordance with its terms and the Executor of the Estate of Walter E. Havighurst is hereby authorized and directed to distribute the residuary of the Havighurst estate to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the uses and purposes set forth in Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the terms of the charitable trust, as set out in the Last Will and Testament of Walter E. Havighurst, create no reversionary interest in the heirs of Walter E. Havighurst, and it is

FURTHER ORDERED, ADJUDGED and DECREED that the Amended Counterclaim filed by the Defendant, Alan W. Havighurst, is dismissed, and it is

FURTHER ORDERED, ADJUDGED and decreed that the Amended Counterclaim filed by the

Defendant, Douglas A. Havighurst, is dismised, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, as the Executor of the Estate of Walter E. Havighurst shall pay the costs of this action.

Dated: December 15, 1965 /s/
Randy T. Rogers,
Judge

THE OHIO SUPREME COURT

First National Bank of
Southwestern Ohio, Executor
Etc.

vs,

Miami University et al.

(Alan W. and Douglas Havighurst,
Appellants)

1997 Term
Case No. 97-1472

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $40.00
Paid by Martha C. Lee

(Butler County Court of Appeals;
Nos. 9603047 & CA9603048)

/s/ THOMAS MOYERS, Chief Justice

THE OHIO SUPREME COURT

First National Bank of
Southwestern Ohio, Executor
Etc.

vs,

Miami University et al.

(Alan W. and Douglas Havighurst,
Apepllants)

1997 Term
Case No. 97-1472

RECONSIDERATION ENTRY

It is ordered by the Court that the motion for reconsideration in this case be, and hereby is, denied.

Filed November 12, 1997

(Butler County Court of Appeals;
Nos. 9603047 & CA9603048)

THOMAS MOYER, Chief Justice

CONSTITUTION AND STATUTES INVOLVED

This case involves section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

This case also involves the "Takings Clause" of the Fifth Amendment to the Constitution of the United States, which reads in pertinent part:

> "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Additionally, this case involves three Ohio statues: Ohio Revised Code Sections 2101.24, 2101.31, and 2311.01, which are set forth below.

OHIO REVISED CODE SECTION 2101.24
This statute reads in pertinent part as follows:

"(B)(1) The probate court has concurrent jurisdiction with and the same powers at law and equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine actions as follows:

* * *

(b) Any action that involves an inter vivos trust; a trust created pursuant to section 1339.51 of the Revised Code; a charitable trust or foundation. . . .

(B)(2) Any action that involves a concurrent jurisdiction subject matter and that is before the probate court may be transferred by the probate court, on its order, to the general division of the court of common pleas."

(emphasis added)

* * * * * * * * * *

OHIO REVISED CODE SECTION 2101.31
"All questions of fact shall be determined by the probate judge, unless he orders them tried by a jury, or referred, as provided . . . ."

* * * * * * * * * *

OHIO REVISED CODE SECTION 2311.04

"Issues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure.

Issues of fact arising in actions for money only, or specific real or personal property, shall be tried by a jury unless a jury trial is waived, or unless all parties consent to a reference under the Rules of Civil Procedure.

All other issues of fact shall be tried by the court subject to its power to order any issue to be tried by a jury *** "

OTHER PERTINENT OHIO CONSTITUTIONS AND STATUTES

OHIO CONSTITUTION ARTICLE IV, SEC. 4

"(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state.....

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law...."

OHIO REVISED CODE SECTION 2101.32

"The probate judge shall have the powers and perform the duties provided for, and shall be governed by the sections of the Revised Code and rules that apply to, the courts of common pleas and the judges of those courts. The Rules of Civil Procedures shall govern actions and proceedings in the probate court as provided in Civil Rule 73."

[Paragraph two of Revised Code Sec. 21-1.32 relating to the awarding of costs is not reproduced herein]

OHIO REVISED CODE SECTION 2101.24(B)(2)

"Any action that involves a concurrent jurisdiction subject matter and that is before the probate court, may be transferred by the probate court, on its order, to the general division of the court of common pleas."

OHIO REVISED CODE SECTION 2105.06
(Statute of Descent and Distribution)

(quoted in pertinent part)

"When a person dies intestate having title or right to any personal property or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass parcenary, except as otherwise provided by law, in the following course:

. . . .

(F) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether by the whole or of the half blood of the intestate, or their lineal descendants, per stirpes."

THE NINE PROJECTS
Excerpts from Item III (G) of the Will of Walter Havighurst Regarding Expenditures from Proposed Charitable Trust

1. Funding and promoting presentations to members of the general public on the Soviet Union;

2. Funding and promoting classes and presentations to Miami University students and children on various aspects of Soviet life;

3. Funding and promoting study groups and classes for Miami University students and adults on Soviet-American relations and contemporary Soviet society;

4. Funding and promoting presentations, seminars, and studies on relations between the governments of the United States and the Soviet Union;

5. Funding and promoting programs and classes dealing with conflict relationships at the international level;

6. Funding and promoting Miami University student, and group trips by members of the Oxford, Ohio community to the Soviet Union through a "sister city" program,

according to guidelines set forth by Sister Cities International, Washington, D.C.

7. Funding and promoting group trips to the Soviet Union to allow Miami University students, Oxford, Ohio citizens, and other Americans to meet and establish direct contact with municipal officials, industrial workers, educators, students, medical, legal, and other professionals, agriculturalists, and creative artists;

8. To promote and fund exchanges of children's artwork between Soviet and American children and to promote and to fund consultative services to municipalities and groups wishing to establish direct contact with Soviet people and their counterparts;

9. To establish and fund an endowed professorship of Soviet-American Relations at Miami University, Oxford, Ohio.

PROBATE COURT OF BUTLER COUNTY

FILED
94 MAR 15 PM 3:50
BUTLER COUNTY
PROBATE COURT
JUDGE STEPHEN W. POWELL

ESTATE OF WALTER E. HAVIGHURST, DECEASED
CASE NO. 94-0175 DOCKET_____ PAGE_____

INVENTORY AND APPRAISAL
[R.C.2115.02]

The fiduciary says that to his knowledge the attached schedule of assets in decedent's estate is complete. The fiduciary further says that he determined the value of those assets whose values were readily ascertainable and which were not appraised by the appraiser, and that such values are correct.

The estate is recapitulated as follows:

Tangible personal property	$ 300.00
Intangible personal property	$5,933,888.81
Real Estate	$ 195,000.00
Total	$6,129,188.81

Automobile transferred to surviving spouse under Revised Code Sec. 2113.532(A) .. $ N/A

Attached is a list of the surviving spouse, next of kin, legatees and devisees known to the fiduciary, which list includes

those persons entitled to notice of the hearing on this inventory.

(Check if applicable) - ☐ The surviving spouse is the sole legatee and devisee under decedent's Will, and has not manifested an intention to take against it. It is therefore unnecessary to cite the surviving spouse to make an election.

/s/ Dennis Walsh
Fiduciary

APPRAISER'S CERTIFICATE

The undersigned appraiser agreed to act as appraiser of decedent's estate, and to appraise the property exhibited to him honestly, impartially, and to the best of his knowledge and ability. The appraiser further says that he appraised those assets whose value were not readily ascertainable, indicated on the attached schedule by a check in the column "Appraiser" opposite each such item, and that such values are correct.

See attached
Appraiser

WAIVER OF NOTICE OF TAKING OF INVENTORY

The undersigned surviving spouse hereby waives notice of the time and place of taking the Inventory of decedent's estate.

PROBATE COURT OF BUTLER COUNTY

FILED
94 MAR 15 PM 3:50
BUTLER COUNTY
PROBATE COURT
JUDGE STEPHEN W. POWELL

ESTATE OF WALTER E. HAVIGHURST, DECEASED
CASE NO. 94-0175 DOCKET_____ PAGE_____

SCHEDULE OF ASSETS
[Attach to Inventory and appraisal]

Page 1 of ___ pages

[Insert a check in the column "Appraiser" opposite an item if it was valued by the appraiser. Leave blank if the readily ascertainable value was determined by fiduciary.]

Item	Appraiser	Value
INTANGIBLE PERSONAL PROPERTY: See Schedule A attached		$5,933,888.88
TANGIBLE PERSONAL PROPERTY:		
Household goods and Clothes		300.00
REAL ESTATE:		
Entire interest in real estate known as 163 Shadowy Hills Drive, Oxford, Butler County, Ohio		
See attached Exhibit B	X	195,000.00
	Total:	$6,129,188.81

PROBATE COURT OF BUTLER COUNTY

FILED
94 MAR 24 AM 9:51
BUTLER COUNTY
PROBATE COURT
JUDGE STEPHEN W. POWELL

ESTATE OF WALTER E. HAVIGHURST, DECEASED
CASE NO. 94-0175 DOCKET_____ PAGE_____

SECOND AMENDED
SURVIVING SPOUSE, NEXT OF KIN, LEGATEES AND DEVISEES
[R.C. 2106.13, 2106.13,2107.19]

(Use with those applications or filings requiring some or all of the information in this form, for notice or other purposes. Update as required.)

The following are decedent's known surviving spouse, and other known survivors who are or would be entitled to inherit under the statutes of descent and distribution.

Name	Residence Address	Relationship to Decedent	Birth-date of Minor
None		Surviving Spouse	
None		Children	
MIRIAM HAVIGHURST JOHNSON	229 W. Lincoln, Batavia, IL 60510	Sister	
RUTH NEFF	329 SW First St., Richmond, IN 47374	Niece	

DOROTHY KUCERA	9310 Hamlin Ave., Evanston, IL 60203	Niece
WALTER E. HAVIGHURST	338 W. 77th St., Apt. 5B, New York, N.Y. 10224	Nephew
JAMES P. HAVIGHURST	52 Rapaki Rd. Christchurch 2, New Zealand	Nephew
HELEN BERK	2301 Cheryl Dr. Jacksonville, FL 32217	Niece
ALAN W. HAVIGHURST	3071 Huntington Rd. Shaker Hts.,OH 44120	Nephew
DOUGLAS A. HAVIGHURST	1151 Haselton Rd. Cleveland Hts.,OH 44121	Nephew
(BRUCE J. HAVIGHURST)	DECEASED 8-2-90	Nephew
BRYAN HAVIGHURST*	20861 Byron Rd. Shaker Hts., Oh 44122	Grand-nephew
LAUREN HAVIGHURST*	Box 1513 Amherst College Amherst, MA 01002	Grand-niece

• Children of Bruce Havighurst

(Check whichever of the following is applicable:)

( ) The suriving spouse is the natural or adoptive parent of at least one of decedent's children.

( ) The surviving spouse is not the natural or adoptive parent of any of decedent's children.

( ) There are minor children of the decedent who are not the children of the survivng spouse.

( ) There are minor children of the decedent and no surviving spouse.

FORM 1.0A-Surviving Spouse, Next of Kin, Legatees and Devisees For Persons Deceased on or after May 31, 1990

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

In the Matter of:
ESTATE OF
WALTER E. HAVIGHURST

Estate No. 94-0175

The First National Of Southwestern Ohio
Third & High Streets
Hamilton, OH 45011,
Exectuor

Plaintiff

-vs-

Miami University
Roudebush Hall
Oxford, Ohio 45056

and

Lee Fisher
Attorney General of the State of Ohio
Charitable Foundations Section
15th Floor, State Office Tower
30 East Broad Street
Columbus, OH 43266-0410

Necessary Party (O.R. C. 109.25)
and

Mariam Havighurst Johnson
229 N. Lincoln
Batavia, IL 60510

Judge Stephen Powell

COMPLAINT FOR DECLARATORY JUDGMENT

and

Ruth Neff
329 SW First St.
Richmond, IN 47374
and

Dorothy Kucera
9310 Hamlin Ave.
Evanston, IL 60203
and

Walter M. Havighurst
338 W. 77th St. Apt. 5B
New York, N.Y. 10224
and

James P. Havighurst
52 Rapaki Rd.
Christchurch 2, New Zeland
and

Helen Berk
2301 Cheryl Dr.
Jacksonville, FL 32217
and

Alan W. Havighurst
3071 Huntington Rd.
Shaker Hts., OH 44120
and

Douglas A. Havighurst
1151 Haselton Rd.
Cleveland Hts., OH 44121
and

Bryan Havighurst
20861 Byron Rd.
Shaker Hts., OH 44122
and
Lauren Havighurst
Box 1513 Amherst College
Amherst, MA 01002
and
Samuel Neff
329 SW First St.
Richmond, IN 47374
and
Douglas O. Wilson
218 Kenler Ave.
Bloomington, IN 47408

Defendants.

---

1. The Last Will and Testament (the "Will") of Walter E. Havighurst (the "Testator"), dated September 7, 1988, and a Codicil thereto dated October 11, 1989, were admitted to probate in this Court on February 11, 1994. This Will of the Decedent created a testamentary Charitable Trust, herein referred to as the "Walter E. Havighurst Fund" (a "Charitable Trust", which by Plaintiff's terms gives certain assets, in trust, to the Plaintiff, The First National Bank of Southwestern Ohio [the "Trustee"].) A copy of the Will and Codicil is attached hereto as Exhibit "A".

2. The Will specifies inter ACIA [sic], that the income and principal if necessary, be

used by the Trustee "…to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics." The Will further provides that the President of Miami University, or his or her designee, is to have "…sole discretion to determine the nature of said projects…" within certain guidelines specified in the Will, and to "…determine the amounts necessary to fund said projects."

3. The Testator had a general charitable intent to provide funding for one or more programs relating to the nation, then known as the Union of Soviet Socialist Republics ("U.S.S.R."), as well as the people and institutions then or thereafter located in, or associated with, the area formerly known as the U.S.S.R., such as : presentations on the history of the Soviet Union; presentations for students and children on Soviet life; classes on Soviet-American relations; programs dealing with conflict relationships at the international level; and an endowed professorship in Soviet-American Relations, at Miami University. Such project, and many others, are fully feasible.

4. The Trustee believes that the specific purposes of the Charitable Trust can be fully carried out by the Trustee and the Beneficiary despite the fact that the

U.S.S.R. no longer exists as a country, in that: programs, including some of those specifically enumerated in the Will, and programs that relate to the people and institutions currently located within the areas formerly occupied by the U.S.S.R., all of which would be consistent with the charitable intent of the Testator. The Testator provided that the ultimate decisions about expenditures of funds from the Charitable Trust be made by the President of Miami University, in his or her sole discretion.

5. The Defendant, Miami University, has proposed a plan to implement the terms of the Charitable Trust as set forth in the memorandum attached hereto and marked as "Exhibit B".

6. This is an action for declaratory judgment pursuant to 2721.05 of the Ohio Revised Code for the purpose of determining a question of construction of the Charitable Trust which is in controversy between the parties.

7. Jurisdiction of this action is based on 2101.24 of the Ohio Revised Code, which grants the Probate Court jurisdiction to render declaratory judgments.

8. Plaintiff is a federally-chartered banking institution, operating a trust department, with its principal office in Hamilton, Ohio. Plaintiff is the Trustee of the Charitable Trust.

9. Plaintiff believes that all persons who have any interest or claim which would be affected by a declaratory judgment of this Court have been made parties pursuant to 2721.12 and 109.30 of the Ohio Revised Code.

10. Defendant Attorney General of Ohio is a necessary party pursuant to 109.25 of the Ohio Revised Code.

11. Defendant Miami University is a state institution of higher education in the State of Ohio, and is the beneficiary of the Charitable Trust.

12. Plaintiff believes that the terms of the Charitable Trust, as set out in the Will, create no reversionary interest in any heirs of the Donor.

13. Plaintiff is uncertain as to the extent of its authority under the law and the terms of the Charitable Trust. It requires the guidance and approval of this Court in order to fully carry out the intentions of the Testator.

WHEREFORE, plaintiff requests the guidance and approval of this Court, and that this Court issue a declaratory judgment, pursuant to 2721.05 of the Ohio Revised Code, as follows:

A. Holding that all necessary parties have been joined in this action.

B. Holding that the terms of the Charitable Trust, as set out in the Will, create no reversionary interest in the heirs of the Testator

C. Holding that the Charitable Trust is to be fully funded and carried out, in accordance with its terms

D. Holding that the Trustee, consistent with the charitable intent of the Testator, is authorized by the terms of the Will to provide funding, as otherwise authorized by the Will, for programs related to the U.S.S.R. as it previously existed; for programs related to the people and institutions previously or currently located within the areas formerly occupied by the U.S.S.R.; and for other programs coming within the scope of the Charitable Trust as reasonably interpreted by the President of Miami University in the exercise of his or her sole discretion pursuant to the terms of the Charitable Trust, and as generally set forth in Exhibit B.

Respectfully submitted,

ROBINSON & LIPNICKEY CO.,L.P.A.

By: /s/ James G. Robinson
James G. Robinson A268, 0003513
Attorney for Plaintiff
Park Place West
Oxford, OH 45056
(513) 523-4111

REGARDING EXHIBIT A TO THE COMPLAINT

Exhibit A to the Complaint, the Last Will and Testament of Walter Havighurst, was attached to the Complaint but is not reproduced here in the interests of brevity. However, the trial court's Finding of Fact No. 4 . sets forth Item III of the Will (which contains all provisions relevant to the testamentary trust) in its virtual entirety and in the testator's own words.

Comparison of Selected Findings of Fact and Conclusions of Law As Set Out by the Butler County, Ohio Court of Common Pleas-Probate Division

Finding of Fact	Conclusion of Law
-No.27-	-No.11-
"The primary purpose of Walter E. Havighurst establishing this charitable trust was to fund and promote education and more particularly to fund and promote educational projects that would help build cross-cultural understanding between the 'peoples' of the United States of America and what was known in 1988 as the Union of Soviet Socialist Republics."	"The Testator's primary purpose in establishing this charitable trust was to fund and promote educational projects that would help build cross-cultural understanding between the 'peoples' of the United States of America and what was known in 1988 as the Union of Soviet Socialist Republics."
-No.28-	-No.28-
"Walter E. Havighurst intended the terms 'Union of Soviet Socialist Republics', 'Soviet Union', and 'Soviet',as these terms were used in his Last Will and Testament, to primarily be descriptive of the "peoples" that inhabited that area of the world."	"The testator intended the terms 'Union of Soviet Socialist Republics", 'Soviet Union', and 'Soviet', as these terms were used in his Last Will and Testament, to primarily be descriptive of the 'peoples' that inhabited that area of the world."

and

Finding of Fact	Conclusion of Law
	-No. 22- "The testator intended the terms 'Union of Soviet Socialist Republics', 'Soviet Union',and'Soviet', as these terms were used in his Last Will and Testament, to primarily be descriptive of 'peoples' that inhabited that area of the world."
-No. 29- "The fact that the 'Union of Soviet Socialist Republics' no longer exists as a political entity is of no importance in carrying out the terms of the trust in accordance with the intent of Walter E. Havighurst."	-No. 13- "The fact that the 'Union of Soviet Socialist Republics' no longer exists as a political entity is of no importance in carrying out the terms of the trust in accordance with the intent of Walter E. Havighurst."
-No.26- "The continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics" was not intended by the testator to be an integral factor in in the testator's overall plan	- No.10- "The continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics" was not intended by the testator to be an integral factor in

Finding of Fact	Conclusion of Law
No.26 (cont'd.)	No.10 (cont'd.)
concerning the creation and administration of the Walter E. Havighurst Fund."	the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund."

-

EXCERPTS FROM BRIEFS INDICATING THE RAISING OF THE FEDERAL QUESTIONS

Petitioners set out their claims to deprivation of equal protection under the Fourteenth Amendment to the Constitution of the United States with regard to their jury demands extensively in briefing to the Court of Appeals, and the decision of the Court of Appeals (App. A-1, *infra*) clearly speaks to the federal question of denial of equal protection under the United States Constitution, Amendment Fourteen.

The "Takings" claim under the Fifth Amendment is not so dealt with by the Court of Appeals, and therefore the excerpts that follow are offered.

* * * * * * * * * *

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

-

FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, EXECUTOR OF THE ESTATE OF WALTER E.HAVIGHURST,
Plaintiff-Appellee,

-vs -
MIAMI UNIVERSITY
and
BETTY D. MONTGOMERY, ATTORNEY GENERAL OF THE

No. CA 96-030047
-030048

STATE OF OHIO,
Defendants-Appellees,
and
ALAN W. HAVIGHURST
and
DOUGLAS A. HAVIGHURST,
Defendants-Appellants,
and
MARIAM HAVIGHURST JOHNSON, ET AL.,
Defendants.

BRIEF OF APPELLANTS

[from page 29 of brief]

"This trial court's order, however, extinguishes appellants' rights to proceeds from a lapse of the trust at some future date. This flies in the face of the established rules that "a declaration will not be made as to future rights" in a declaratory judgment action (35 Ojur.3d, Declaratory Judgments, p. 27) and, second, constitutes a "taking" of private property by a state court judge. In that regard, it is clear that the court's order in the case sub judice is state action. Shelley v. Kraemer (1948), 334 U.S. 1, 68 S.Ct. 836. Further, it violates the U.S. Constitution's prohibition of taking of private property for public use without just compensation. Skip Kirchdorfer v. U.S. (1993), 6 F. 3d 1573 (Fed. Cir.) at 1580 . . . . "

* * * * * * * * * *

IN THE SUPREME COURT OF OHIO

FIRST NATIONAL BANK OF
SOUTHWESTERN OHIO, Executor
Of the Estate of Walter E. Havighurst
v.
MIAMI UNIVERSITY
and
BETTY D. MONTGOMERY,
Ohio Attorney
General
Defendants-Appellees
and
ALAN W. HAVIGHURST and
DOUGLAS HAVIGHURST
Defendants-Appellants
and
MARIAM HAVIGHURST JOHNSON et al.
Defendants

Court of Appeals
Case Nos. CA9603047
CA9603048

FILED
JUL 15 1997
Marcia Mengel,
Clerk, Supreme
Court of Ohio

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS ALAN W. HAVIGHURST AND DOUGLAS HAVIGHURST

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Of Counsel:
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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION . . . . . .

Authorities
U.S. Constitution, Fifth Amendment..
Ohio Constitution, Section 19, Article I
Shelley v. Kraemer (1948), 334 U.S. 1...
U.S. Constitution, Fourteenth Amendment
Ohio Constitution, Sections 2,5,16 Article I..... . . . . .
R.C. 2311.04. . . . . .
R.C. 2101.31. . . . . .
Sorrell v. Thevenir (1994), 623 N.E.2d 504, 69 Ohio St.3d 415 . . . . . .
Phila. Baptist Assoc. v. Hart (1819), 17 U.S. 1 . . . . . .

* * *

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1:- The extinction, in favor of a state instrumentality, of the reversionary interests of heirs at law in a testamentary charitable trust is an unconstitutional taking of private property for public use without just compensation.

* * *

PROPOSITION OF LAW NO. 2: Where trial by jury is mandatory in one division of the common pleas court, it is a denial of

due process and equal protection that trial by jury is merely discretionary in another division of the same court on the same claims and questions of fact.

* * *

The appellate court herein created a conflict of laws by holding that the right to jury is not a fundamental right, in employing the rational basis test as opposed to the required strict scrutiny test, and, accordingly, failing to find any compelling state interest served by R.C. 2101.31. Sorrell, supra.

Both lower courts rely upon Benee v. Sanders (1953), 160 Ohio St. 279, 116 N.E.2d 420. That position is based on R.C. 2101.31, a 1953 statute, viz., that a jury in declaratory judgment actions in probate court is discretionary. Appellants say the right to jury in this case is mandatory. The appellate court's holding stems from the outmoded proposition set forth in the Fifth Syllabus of Sanders, supra, which says, in part, "questions of fact arising in trial of the issues shall be determined by the probate judge. . . unless in the exercise of his discretion"he orders those questions be tried by a jury.

The Modern Courts Amendment of 1967, R.C. 2101.24 (most recently amended in 1995) and R.C. 2311.04 (most recently amended in 1976) change the rule of Sanders, supra. The latter statute provides a mandatory trial by jury, as follows: "Issues of fact arising in actions for the recovery of money only or ...personal property shall

be tried by a jury...." (emphasis added).

* * *

The question thus becomes that of which statute shall govern. The answer to the question--in favor of appellants--is made manifest in consideration of the due process/equal protection aspect of the argument. Given the change in Ohio law since Sanders, the mandatory right of R.C. 2311.04 must extend to appropriate actions in the probate court, and R.C. 2101.31 is unconstitutional as applied.

The question thus becomes that of which statute shall govern. The answer to the question -- in favor of appellants -- is made manifest in consideration of the due process/equal protection aspect of the argument. Given the change in Ohio law since Sanders, the mandatory right of R.C. 2311.04 must extend to appropriate actions in the probate court, and R.C. 2101.31 is unconstitutional as applied.

Thus, it is abundantly clear that this case could have begun in the general division of common pleas court. R.C. 2101.24(B)(1)(b) establishes concurrent jurisdiction in the probate and the general division for actions involving charitable trusts. That declaratory judgment actions involving charitable trusts have been tried in the general division is exemplified by the cases of Fenn College et al. v; Nance et al. (1965), 33 Ohio Op.2d 292, 210 N.E.2d 418, (Common Pleas, Cuyahoga County) and DeMar v. Mosley (1993), 619 N.E.2d 1239, 63 Ohio Misc.2d 102. It is equally clear

the mandatory jury rule of R.C. 2311.04 would have applied in the general division.

Accordingly, the appellants herein are being subjected to a denial of due process of law in violation of R.C. 2311.04 and equal protection standards. U.S. Constitution, Fifth, Seventh, and Fourteenth Amendments; Ohio Constitution, Art. I, Secs. 2, 5, 16. The right to jury trial is a fundamental, substantive, and not a mere procedural right. Kneisley v. Lattimer Steven Co. (1988), 40 Ohio St.3d 354, 533 N.E.2d 743 at 746. The denial of a jury trial where factual issues were in controversy denied appellants "a fundamental constitutional right" and "a substantial right." Cleveland Ry. v. Halliday (1933), 127 Ohio St. 278, 284. It existed when the Ohio constitution was adopted in 1851; Allison v. McCune, supra.

Supreme Court, U.S.
FILED
JUL 20 1998
OFFICE OF THE CLERK

No. 97-2039

In The

Supreme Court of the United States

October Term, 1997

ALAN HAVIGHURST and DOUGLAS HAVIGHURST,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Executor of the Estate of WALTER HAVIGHURST,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Butler County

RESPONDENT'S BRIEF IN OPPOSITION

JAMES G. ROBINSON
Counsel of Record
ROBINSON & LIPNICKEY CO., L.P.A.
Attorneys for Respondent
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(513) 523-4111

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(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS
Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

I. Whether there is an absolute right to a jury evaluation of factual issues arising in a declaratory judgment action in a state probate court where the relief sought in the declaratory judgment is equitable in nature.

II. Whether a state trial court has the authority to effectuate the intent of the testator in the context of a charitable trust where a fiduciary, had the right and duty to file a complaint for declaratory judgment and the court had the authority to render judgment pursuant to established provisions of the Ohio Revised Code.

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II. The Trial Court Did Not Ipse Dixit Extinguish The Reversionary Rights Of The Heirs Of The Testator So As To Constitute An Impermissible Taking In Violation Of The Fifth And Fourteenth Amendments Of The Constitution Of The United States. On The Contrary, The Trial Court's Rulings Were Supported By The Manifest Weight Of The Evidence, and the Pertinent Will Provisions Were Construed In Accordance With the Intent of the Testator. The Respondent Herein, First National Bank, as a Fiduciary, Had The Authority And The Duty, Under R.C. §§ 2721.05, 109.25 and 109.30 to Initiate the Declaratory Judgment Proceeding; the Trial Court, Then, Was Not Acting Ipse Dixit, But Rather Based On Authority Under The Following Provisions Of Applicable Ohio Law: R.C. §§ 2721.05, 109.25, 109.30, 2311.04 And 2101.31. 15

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Bobko v. Sagen, 61 Ohio App. 3d 397, 572 N.E. 823 (1989) 11

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STATEMENT OF THE CASE

A. Procedural History

Walter E. Havighurst, the Testator herein, died on February 4, 1994, at the age of 92. His Will dated September 7, 1988, and a Codicil thereto, dated October 11, 1989, were admitted to probate by the Butler County, Ohio Probate Court on February 11, 1994. The Testator's spouse had predeceased him, and he was survived only by a sister and several nieces and nephews.

By his Will and Codicil the Testator left $100,000 to his sister; $130,000 to his surviving nieces and nephews; items of personal property to his niece, Ruth Havighurst Neff and her husband, Sam; his residential real estate to Miami University (appraised at $195,000); forgave a debt, originally in the amount of $50,000 owed to him by Douglas and Sue Wilson; a painting, his books and manuscripts to Miami University; and his clothing to Goodwill Industries. In addition, he left $250,000 to Miami University as an endowment for the Special Collections Library at that institution, a collection which bears his name.

The residue of his estate was left to the First National Bank of Southwestern Ohio, in trust, for the promotion of educational projects through the Miami University International Center. It is the terms and conditions of this residual gift which constitute the gravamen of this case.

On October 20, 1994, the Executor of the Testator's estate, the First National Bank of Southwestern Ohio, the Respondent herein, filed a *Complaint for Declaratory Judgment* in the Butler County Probate Court, as it had the authority and duty to do so as a fiduciary pursuant to R.C. § 2721.05, 109.25, and 109.30 (T.d. 1).

Answers were filed, some pro se, by the parties Defendant, including the Ohio Attorney General.[1] In addition to their Answers, Petitioners Alan W. Havighurst and Douglas A. Havighurst, nephews of the Testator, filed Counterclaims, alleging, inter alia, that the decedent's "putative trust cannot be carried out in accordance with its terms" and requesting that the Court declare the Testator's residual estate to be intestate property, or that the Court implement an alternative plan as to Testator's residual estate, as proposed by the Appellant-Petitioners.

The Court made several pre-trial rulings while the case was pending, pursuant to Motions filed by the parties, and on its own initiative, including the granting of the Respondent's *Motion to Strike Jury Demand of Appellants* (T.d. 194) (Petitioner's Brief, p. 32-a).

The matter was tried to the Court on September 5 and 6, 1995. The Court then entertained post-trial briefs from the parties. The Court entered its *Opinion and Judgment Entry of Declaratory Judgment, Final Appealable Order* on December 15, 1995 (T.d. 224) (Petitioner's Brief, p. 39-a). The Trial Court, pursuant to Appellant-Petitioners' request, issued its *Findings of Fact and Conclusions of Law* on February 21, 1996 (T.d. 233) (Petitioner's Brief, p. 68-a), and its *Amended Entry of Declaratory Judgment, Final Appealable Order* (T.d. 234) (Petitioner's Brief, p. 87-a). To clarify matters, this *Amended Entry of Declaratory Judgment, Final Appealable Order*, was not issued on December 15, 1965, as the Petitioner's Brief states, but rather, on February 21, 1996.

The Appellant-Petitioners appealed from these entries of the Butler County, Ohio Probate Court to the Twelfth District

1. The Ohio Attorney General was a necessary party to this action pursuant to Ohio Revised Code Section 109.24.

Court of Appeals of Ohio, Butler County. The Twelfth District judges recused themselves, and the case was decided by a three-judge panel comprised of justices from the First Appellate District, as assigned by Ohio Supreme Court Chief Justice Thomas Moyer. The panel issued an opinion on June 6, 1997, affirming the decision of the Trial Court (Petitioner's Brief, p. 3-a). Petitioners filed a Motion to Certify with the Ohio Supreme Court (Petitioner's Brief, p. 93-a) and a Motion for Rehearing with that Court (Petitioner's Brief, p. 94-a), both of which were denied. Petitioners now seek a writ of certiorari to the Supreme Court of the United States.

B. Statement of Facts

Pursuant to the Complaint for Declaratory Judgment and the pleadings of the parties subsequent thereto, the following facts were admitted to be true:

1. that the Will and Codicil of Walter E. Havighurst, admitted to probate by the Butler County, Ohio Probate Court, was the Last Will and Testament of the Decedent;

2. that the Declaratory Judgment action before the Court was for the purpose of determining a question of construction of the Charitable Trust, set forth in the Testator's Will;

3. *that the Probate Court had proper jurisdiction over the matter* (emphasis added);

4. that all parties who had an interest or claim which would be affected by the declaratory judgment of the Court had been made parties to the action;

5. that the Defendant Attorney General of Ohio was a necessary party to the action;

6. that Miami University, who was named in several parts of the Testator's Will is a state-supported institution of *higher education* in the State of Ohio (emphasis added).[2]

Given these facts, the issue before the Court was the interpretation of the provisions in the residual clause of the Testator's Will, to give construction thereto, and determine the rights and responsibilities of the parties, given the Court's construction and findings (T.d. 190).

At trial, the parties also agreed that the Union of Soviet Socialist Republics, as a political entity, no longer existed.

The Plaintiff-Appellee, First National Bank of Southwestern Ohio, Respondent herein, introduced the testimony of Dennis G. Walsh, a Trust Officer with the Plaintiff. Mr. Walsh established by his testimony that the Testator had a long-standing relationship with the Plaintiff, as did the Testator's deceased wife (T.p. 15); that based on his review of the Will, his conversations with certain members of the Testator's family; his review of the proposed plan submitted by Miami University; and advice of counsel, that the Plaintiff-Appellee could carry out the intentions of the Testator in relation to the terms of his Will regarding his residual estate (T.p. 16, 17, 18 and 19). Mr. Walsh, on cross-examination by Petitioner's counsel, set forth the elaborate procedures that the Testator included in his Will

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2. Plaintiff-Appellee's Complaint for Declaratory Judgment (T.d. 1); Answer of Attorney General, Lee Fisher (T.d. 19); Answer of Defendant-Appellant, Alan W. Havighurst (T.d. 38); Answer of Defendant-Appellant, Douglas A. Havighurst (T.d. 39); Answer of Defendant, Miami University (T.d. 42).

so that his charitable intentions would be carried out, to wit: involvement by a corporate Testamentary Trustee with fiduciary duties and subject to review by the Probate Court (T.p. 32); that written plans for the use of the funds would have to be submitted to the Trustee by Miami University, for review (T.p. 32); that the President of Miami University would oversee the expenditures (T.p. 35); that the Trustee would seek direction from the Probate Court regarding the management and distribution of the trust assets (T.p. 36).

The former President of Miami University, Paul Pearson, testified that he had met with the Testator in August of 1988 (T.p. 42), a few days before the date of the Testator's Will and that the Testator had discussed the details of his specific testamentary intent with Mr. Pearson (T.p. 43).

The Respondent's expert witness, Paul Allen Goble is a renowned author and scholar on the territory that was the Soviet Union. He has visited the area formerly known as the U.S.S.R., speaks Russian as well as the languages spoken in 10 of the 14 former Soviet Republics, has briefed members of Congress and agencies of the local government (T.p. 97).

Mr. Goble gave unequivocal testimony supporting the position that the Testator's intent could be carried out, despite the fact that the U.S.S.R. no longer existed as a political entity. Goble testified that university academic programs, Web sites, and E-mail correspondence still refer to the area of the former U.S.S.R. as an "integral whole" (T.p. 101). Academic presentations to the public regarding the "Soviet Union" are still relevant and important (T.p. 106). Given the presence of nuclear weapons in that area, the study of the current relationship of the U.S. government and the governments of the 11 countries that were formerly part of the U.S.S.R., and now the Russian Federation, is extremely important (T.p. 107). In addition, there

is a current need to fund exchanges of municipal officials, educators and students from the United States to the countries of the former Soviet Union as well as from those countries to the U.S. (T.p. 108, 109 and 116). It is critical for the U.S. as a nation, to study the language and culture of the area and this need is more critical today then it was prior to the fall of the U.S.S.R. as a political (T.p. 114, 115, 139 and 140). Finally, Mr. Goble testified that each of the nine guidelines (Petitioner's Brief, p. 102-a) could be "realized" (T.p. 117).

The Respondents presented the testimony of Dr. Joseph Urell, the Associate Vice President and Associate Provost at Miami University. Dr. Urell testified that after the Testator's death, he convened a committee of individuals who had "some acknowledged expertise in the area now known as the former Soviet Union," and who had backgrounds "in a diversity of disciplines, business, economics, education, history, political science . . ." (T.p. 61). He also engaged consultants from outside the University (T.p. 63 and 64) to provide input to the committee. This committee developed a plan to implement programs at Miami University "that were consistent with the Will" (T.p. 65) fully incorporating the Testator's nine guidelines (T.p. 68). Dr. Urell, on behalf of the then President of Miami University, consulted with Ruth and Sam Neff, the Testator's niece and her husband (T.p. 69 and 70) as required by the Testator's Will.

The Petitioner's called as their expert witness Heather Hogan, a professor of history at Oberlin College. Professor Hogan's indicated area of scholarship and teaching is Modern Russian History (T.p. 154). Professor Hogan, by her testimony, supported the "efficacy of doing cross-cultural programs with the former Soviet Union in the content of university setting" (T.p. 157); she advocated the current study of "Russian and Soviet Studies" in the context of a liberal arts education

(T.p. 170-171); she stated that from a historical standpoint, the study of the Soviet Union, as it existed continues to be a legitimate area of study (T.p. 172) as would be the political history and the types of governments that the peoples of the former Soviet Union believed in or tried (T.p. 174). Professor Hogan also testified that she would like to expose her students to the artistic endeavors and cultures of the peoples of the former Soviet Union (T.p. 176).

Professor Hogan further offered that the study of "Soviet Politics" continued at her institution even after the fall of the Soviet Union in 1991 (T.p. 180) and that in her opinion, the need to study that part of the world remained justified (T.p. 181).

After consideration of the testimony, exhibits presented at trial, and the parties' post trial briefs, the Trial Court issued its *Findings of Facts and Conclusions of Law* and its *Amended Judgment Entry of Declaratory Judgment,* as stated above, on February 21, 1996, which inter alia, dismissed the Amended Counterclaims of the Appellants and found that the

> charitable trust created by the provisions of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst be fully funded and carried out in accordance with its terms . . .

(Petitioner's Brief, p. 90-a).

The three-judge panel sitting for the Court of Appeals, Twelfth Appellate District of Ohio, Butler County, affirmed the decision of the Trial Court on appeal. The Petitioners' counterclaims were "predicated on the assertion that the Testator's aim was to ease Cold War tensions between the United States and the U.S.S.R." and maintained that the trust must fail

since the collapse of the U.S.S.R. meant that the threat of nuclear war had come to an end. The Appellate Court found that the manifest weight of the evidence rendered the Petitioners' counterclaims meritless, stating:

> . . . the evidence was *uncontroverted* that the region still possesses a nuclear capacity that, with the demise of the U.S.S.R. as a political entity and the consequent destabilization of the region continues to pose a threat to the United States.

First National Bank v. Miami University, et al., Court of Appeals, 12th Appellate District of Ohio, Butler County (1997) (Petitioner's Brief, p. 10-a).

The Appellate Court furthermore stated that the judgment of the lower court was sufficiently supported by the evidence:

> Our review of the record of the proceedings below discloses that the probate court had before it competent and credible evidence to support its entry of declaratory judgment preserving the trust and its dismissal of appellants' counterclaims.

First National Bank v. Miami University, et al. (Petitioner's Brief, p. 10-a).

The Court continued by rejecting the Petitioners' second assignment of error, where the Petitioners posed a challenge to the denial of their demands for a jury trial. This assignment of error constitutes the Appellate-Petitioners first issue in their petition for a writ of certiorari and is dealt with in the following section.

REASONS FOR DENYING THE WRIT

I.

THE OHIO PROBATE COURT HAD THE AUTHORITY TO DENY THE PETITIONERS' REQUEST FOR A TRIAL BY JURY, SINCE THE PROBATE COURT HAS JURISDICTION CONCURRENT WITH THE GENERAL DIVISION OF THE COMMON PLEAS COURT, AND THERE IS NO ABSOLUTE RIGHT TO A JURY EVALUATION OF FACTUAL ISSUES ARISING IN A DECLARATORY JUDGMENT ACTION IN PROBATE COURT. THE PROBATE JUDGE HAS THE AUTHORITY TO ACT PURSUANT TO OHIO REVISED CODE §2101.31 AND DETERMINE "ALL QUESTIONS OF FACT." EVEN IF THE MATTER HAD ARISEN IN THE COURT OF COMMON PLEAS, R.C. §2311.04 WOULD NOT ACT TO EXTEND THE RIGHT TO A TRIAL BY JURY, SINCE THE RELIEF SOUGHT IS PREDOMINANTLY EQUITABLE IN NATURE.

Petitioners contend that their rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution have been violated due to an apparent conflict between two provisions of the Ohio Revised Code, §§ 2101.31 and 2311.04, and that they were improperly denied the right to a trial by jury. This contention lacks merit, as evidenced by nearly 150 years of precedent, and furthermore is misguided due to the fact that the matter originated not in the Court of Common Pleas, General Division but in the Probate Court. In addition, *even if the matter had originated in the General Division of the Common Pleas Court*, there would not have been an absolute right to a jury trial. Indeed, under the facts in the case at bar, R.C. § 2311.04 would *not* have conferred the right to a trial by jury.

The Petitioners' Brief claims that had the matter originated in the General Division of the Court of Common Pleas, where it *could* have been originally filed, there would have been a right to a trial by jury pursuant to R.C. § 2311.04. Petitioner's Brief, p. 12. This assertion is misguided in several respects.

First National Bank opted to proceed in the Probate Court, as it had every right to do so. As the Court of Appeals of the Twelfth Appellate District of Ohio stated:

> . . . the probate division and the general division of the common pleas court have concurrent jurisdiction to hear and determine an action involving a charitable trust. R.C. § 2101.24(B)(1)(b). FNB [First National Bank], therefore, could have instituted and maintained its declaratory judgment action in *either the probate division or the general division of the common pleas court.*
>
> Once FNB chose to proceed in probate court, appellants' options were limited. As between courts of concurrent jurisdiction, *the court that first acquires jurisdiction over the parties has exclusive jurisdiction to adjudicate the matter.*

(Petitioner's Brief, p. 16-a). *First National Bank v. Miami University, et al.* (1997), Court of Appeals, 12th Appellate District of Ohio, Butler County (emphasis added). *See also Kane v. Kane* (1946), 146 Ohio St. 686, 67 N.E. 2d 783.

As the Petitioners' Brief concedes, the Probate Judge had the authority to deny the right to a trial by jury. R.C. § 2101.31 clearly and unequivocally gives the Probate Judge the authority to determine "all questions of fact" unless "he orders them tried by a jury . . ." or referred to a jury. Therefore, the Probate Judge,

in *his sole discretion* shall determine who shall be the trier of facts. 35 O. Jur. 3d, *Declaratory Judgments* § 41, at 85 and 86.

The Ohio Supreme Court has upheld the right of the probate court to determine issues of fact and law in *all* matters brought to that court. The court in *Renee v. Sanders, et al.*, 160 Ohio St. 279, 116 N.E. 2d 420 (1953) held that when a matter is within the jurisdiction of the probate court in a declaratory judgment proceeding, R.C. § 2101.31 governs the proceedings and gives the Probate Judge the discretion to decide whether issues of fact will be tried by a jury. *See also Bobko v. Sagen*, 61 Ohio App. 3d 397, 407, 572 N.E. 823, 829-830 (1989) and *State ex rel. Kear v. Court of Common Pleas of Lucas County, Probate Division*, 61 Ohio St. 2d 189, 191, 423 N.E. 2d 427, 429 (1981).

In *Giurbino v. Giurbino*, 89 Ohio App. 3d 646, 626 N.E. 2d 1017 (1993), the Cuyahoga County Court of Appeals reviewed this issue, citing R.C. § 2101.31, *Bobko*, and *Renee*. The *Giurbino* court reaffirmed that the Probate Judge shall determine all questions of fact presented to the Probate Court, even in declaratory judgment actions, unless the Judge orders such issues to be tried by a jury. The *Giurbino* court directly addressed the issue of the conflicting code provisions, citing *Renee* as follows:

> This rule [R.C. § 2101.31] applies despite language in R.C. § 2311.04 which provides that issues of fact arising in actions for the recovery of real or personal property be tried by a jury.

Petitioners claim that R.C. § 2101.31 in this case should "not be allowed to trump" the jury trial provision as set forth in R.C. § 2311.04. The Court of Appeals rejected this notion, citing the Ohio Supreme Court in *Renee*:

> . . . The Ohio Supreme Court in its decision in *Renee*, acknowledged the potential conflict between R.C. §§ 2101.31 and 2311.04, without confronting the equal protection implications. The court noted that *the two sections have coexisted since 1853*, found no statement in the Revised Code to suggest that R.C. § 2311.04 supersedes or overrides R.C. § 2101.31, and posited that a determination that R.C. § 2311.04 mandated a jury trial would *effectively nullify* R.C. § 2101.31. Having set forth these considerations and held that R.C. § 2101.31 vests in the probate court the discretion to determine whether factual issues would be tried by a jury, the court declared its holding to be "entirely consistent with the provisions of [R.C. § 2721.10] and *not [in] conflict* with the provisions of [R.C. § 2311.04]."

First National Bank v. Miami University, et al. (emphasis added) (Petitioners' Brief, p. 15-a).

The action contemplated by R.C. § 2101.31 acknowledges that the Probate Court will by the nature of the jurisdiction of that Court, under Ohio law, will have equitable issues of law to consider and rule on. Clearly, the declaratory judgment action filed by the Respondent in this case sought equitable determinations. It was not as the Petitioners have argued, an action in which the Respondent sought the recovery of real or personal property.

Petitioners' argument that R.C. § 2311.04 "mandates jury trials in Ohio Common Pleas Courts where money or specific property is sought" (Petitioners' Brief, p. 17) contains little, if any, relevance to the case at bar. The Respondent-Executor determined it had a duty to proceed in the *Probate Court*, rather

Division of the Court of Common Pleas, and when it did so, R.C. § 2101.31 became the relevant governing authority.

The assertion by Petitioners that they would have been entitled to a trial by jury pursuant to R.C. § 2311.04 had the matter arisen in the General Division of the Court of Common Pleas lacks merit due to the fact that the relief sought is *equitable* in nature. R.C. § 2311.04 provides:

> . . . Issues of fact arising in actions *for money only, or specific real or personal property*, shall be tried by a jury unless a jury trial is waived, or unless all parties consent to a reference under the Rules of Civil Procedure

(Emphasis added).

As the Ohio Court of Appeals below noted, "The right to a jury trial thereby conferred depends upon the nature and character of the relief sought." *First National Bank v. Miami University, et al.* The court further noted, "When the pleadings seek a mixture of legal and equitable relief, the right to a jury trial depends upon the action's primary and predominant objective," citing *Murello Construction Co. v. Citizens Home Savings Co.*, 29 Ohio App. 3d 333, 334, 505 N.E. 2d 637, 638 (1985) and *Huntington National Bank v. Heritage Investment Group*, 12 Ohio App. 3d 113, 114, 467 N.E. 2d 564, 566 (1983). *Id.*

In the case at bar the relief sought was predominantly equitable. Gifts for charitable purposes have always been favored in equity, and trusts created for such purposes are carried into effect upon broad liberal principles of equity jurisprudence under circumstances where a purely private trust may fall. *See Gearhart v. Richardson*, 109 Ohio St. 418, 142 N.E. 890 (1924), and

Springfield v. Patterson, 26 Ohio Misc. 242, 249, 270 N.E. 2d 683, 687 (1970). The Court of Appeals below noted the *Gearhart* court's holding that "*an action construing a will creating a trust is equitable in nature*" (emphasis added). *First National Bank v. Miami University, et al.* Therefore, even if the proceedings had originated in the Court of Common Pleas, R.C. § 2311.04 would not mandate a trial by jury.

Petitioners cite several cases (Petitioners' Brief, p. 17) following the statement:

> Ohio Revised Code Section 2311.04, which mandates jury trials in Ohio Common Pleas Courts where money or specific personal property is sought, has been scrupulously followed in cases where fact finding is required.

This statement may very well be accurate, but it and the authority in the cases that follow do not serve in any way to advance the claims of the Petitioners.

First, the declaratory judgment in the case at bar was initiated in the *Probate Court*, and not in the General Division of the Court of Common Pleas, as were all the cases cited by the Petitioners. Secondly, the cases cited by the Petitioners all involved instances where the relief sought was "*money or specific personal property*" (Petitioners' Brief, p. 17). In the case at bar, the primary and predominant relief sought was held to be *equitable* based on the authority of *Gearhart v. Richardson. See First National Bank of Southwestern Ohio v. Miami University, et al.*, Petitioner's Brief, p. 13-a. The cases cited by Petitioners are clearly not on point, and do not serve as either precedent or even *relevant* authority.

II.

THE TRIAL COURT DID NOT IPSE DIXIT EXTINGUISH THE REVERSIONARY RIGHTS OF THE HEIRS OF THE TESTATOR SO AS TO CONSTITUTE AN IMPERMISSIBLE TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES. ON THE CONTRARY, THE TRIAL COURT'S RULINGS WERE SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE, AND THE PERTINENT WILL PROVISIONS WERE CONSTRUED IN ACCORDANCE WITH THE INTENT OF THE TESTATOR. THE RESPONDENT HEREIN, FIRST NATIONAL BANK, AS A FIDUCIARY, HAD THE AUTHORITY AND THE DUTY, UNDER R.C. §§ 2721.05, 109.25 AND 109.30 TO INITIATE THE DECLARATORY JUDGMENT PROCEEDING; THE TRIAL COURT, THEN, WAS NOT ACTING IPSE DIXIT, BUT RATHER BASED ON AUTHORITY UNDER THE FOLLOWING PROVISIONS OF APPLICABLE OHIO LAW: R.C. §§ 2721.05, 109.25, 109.30, 2311.04 AND 2101.31.

The Respondent, First National Bank of Southwestern Ohio, as a fiduciary, had the authority and a duty to initiate the declaratory judgment proceeding in the Probate Court pursuant to R.C. §§ 2721.05, 109.25 and 109.30. Ohio Revised Code Section 2721.05 provides:

> **2721.05 DETERMINATION OF RIGHTS OR LEGAL RELATIONS**
>
> Any person interested as or through an *executor*, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the

> estate of a decedent, an infant, lunatic, or insolvent, *may have a declaration of rights or legal relations* in respect thereto in any of the following cases:
>
> > (A) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
> >
> > (B) To direct the executors, administrators, trustees, or other fiduciaries to do or abstain from doing any particular act in their fiduciary capacity;
> >
> > (C) *To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings*

(Emphasis added).

The Petitioners assert in their Brief that there was an "unlawful" and "arbitrary" taking, citing *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902) (Petitioners' Brief, p. 28). To the contrary, the Executor had the authority to initiate the action and the Probate Court had jurisdiction and authority to render judgment under established provisions of the Ohio Revised Code. This clearly can not be properly classified as "unlawful" or "arbitrary." As the Executor of the Estate of the Testator, Walter E. Havighurst, the First National Bank of Southwestern Ohio had the right and the duty to file a complaint for declaratory judgment pursuant to R.C. § 2721.05, and the Probate Court had the authority to adjudicate the matter without a jury pursuant to § 2101.31.

Contrary to the assertions of the Petitioners, there was not an impermissible taking of the reversionary interests of the Petitioners, Alan and Douglas Havighurst. The Ohio Probate Court, vested with proper authority and jurisdiction to adjudicate the matter, found that the Walter E. Havighurst Fund was "designed by the testator 'to promote and fund educational projects' " and that there was a "charitable trust" contained "within the language of [the] residuary clause" (Petitioners' Brief, p. 53-a). The Probate Court furthermore found that the "Walter E. Havighurst Fund is a charitable trust as that term has been construed by the Courts of Ohio" (Petitioners' Brief, p. 55-a).

There is no doubt as to the Testator's manifestation of a *general charitable intent* to provide funding for programs of cross-cultural understanding. The Trial Court made a finding that the Testator "manifested a general charitable intention . . . to donate his residuary estate to charitable purposes" (para. 21, p. 14, *Findings of Fact and Conclusions of Law*) (T.d. 233). After setting forth the requisite preliminary language naming the trustee and establishing the general powers of the trustee, the Testator's Will specifically provides for the income of the trust estate, as well as the principal, if necessary, to be used to establish these programs. The nature of the programs lie within the sole discretion of the President of Miami University, or his or her designee. The President is then provided with a series of *guidelines*, but the Testator goes on to reiterate that the ultimate and sole discretion with respect to the establishment of these programs lies with the President of Miami University.

The Ohio Probate Court, in discussing the guidelines for review of the terms of a "testamentary charitable trust" stated:

> . . . the court must examine the language of the charitable trust to see what the testator intended to

> be accomplished by the administration of the charitable trust. The language of the Havighurst Will *clearly reflects* that the testator intended that the trust funds be used to promote and fund educational projects for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics . . .
>
> The Court finds that the continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics" *was not intended* by the testator to be an integral factor in the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund . . . The Court further finds that the testator intended the terms "Union of Soviet Socialist Republics," "Soviet Union," and "Soviet" to primarily be descriptive of the "peoples" that inhabited that area of the world. *The fact that the "Union of Soviet Socialist Republics" no longer exists as a political entity is of no importance in carrying out the terms of this charitable trust in accordance with the intent of the testator.*

(Petitioners' Brief, pp. 56-a, 57-a, emphasis added).

The Petitioners claim that the Trial Court has transformed a "private charitable trust" into a "public charitable trust" (Petitioners' Brief, p. 20). This is a gross mischaracterization of the effect of the Trial Court's order. From the language, it is clear and obvious that the Testator manifested a general charitable intent to fund programs through the International Center of Miami University for the purpose of furthering cross-cultural understanding between the "peoples" of the United States of America and those "peoples" of the entity formerly known as the Union of Soviet Socialists Republic. The Trial Court *preserved* the trust estate to *fulfill* the general intent of the Testator.

The claim by the Petitioners that the Probate Court ipse dixit extinguished the reversionary rights of Alan and Douglas Havighurst is without merit. The Probate Court acted within its power and adhered to established Ohio law in rendering judgment and in effectuating the intent of the Testator.

The claims of Alan and Douglas Havighurst are severely undercut as well from a standing viewpoint. If the trust described in Paragraph G of the Havighurst Will was found to have lapsed, the proposed gift of trust would fail and the residuary estate would pass as intestate property according to Ohio's Statute of Descent and Distribution, namely R.C. § 2105.06. However, § 2105.06(F) provides:

> if there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and *sisters*, whether of the whole or the half blood of the intestate, or their lineal descendants, per stirpes.

Therefore, the residuary estate of Walter Havighurst would have passed to his sister then living, Mrs. Miriam Havighurst Johnson, and not to the Petitioners. It remains a curious aspect of this case why the Petitioners have continued to pursue this matter, as they would not inherit the residuary estate under Ohio law.

There is no federal question raised by the Petitioners, as there has been no violation of the Fifth and Fourteenth Amendments of the United States Constitution. The Ohio Probate Court did not, as the Petitioners claim, arbitrarily take the reversionary interest of Alan and Douglas Havighurst so as to constitute a violation of the Takings Clause.

Petitioners cite in their brief Justice Blackmun's opinion "... by ipse dixit, may not transform private property into

public property without compensation . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). (Petitioners' Brief p. 21). The term *ipse dixit*, is an assertion by one whose *sole authority* for it is the fact that he himself has said it. Barron's Law Dictionary (3rd ed. 1991). This is clearly not the case here. The Ohio Probate Court was acting within its' authority and under established provisions of the Ohio Revised Code. The claim by Petitioners that the Ohio Probate Court acted unilaterally without outside authority clearly lacks merit.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — OHIO REVISED CODE SECTION 109.25

ORC § 109.25 — **Necessary party to charitable trust proceedings.**

The attorney general is a necessary party to and shall be served with process or with summons by registered mail in all judicial proceedings, the object of which is to:

(A) Terminate a charitable trust or distribute assets:

(B) Depart from the objects or purposes of a charitable trust as the same are set forth in the instrument creating the trust, including any proceeding for the application of the doctrine of cy pres or deviation;

(C) Construe the provisions of an instrument with respect to a charitable trust;

(D) Determine the validity of a will having provisions for a charitable trust.

A judgment rendered in such proceedings without service of process or summons upon the attorney general is void, unenforceable, and shall be set aside upon the attorney general's motion seeking such relief. The attorney general shall intervene in any judicial proceeding affecting a charitable trust when requested to do so by the court having jurisdiction of the proceeding, and may intervene in any judicial proceeding affecting a charitable trust when he determines that the public interest should be protected in such proceeding.

APPENDIX B — OHIO REVISED CODE SECTION 109.30

ORC § 109.30 — **Notice to attorney general and specified persons after probate of will.**

> After admission to probate of a will creating or purporting to create a charitable trust that must be registered under section 109.26 of the Revised Code, or containing a gift valued in excess of one thousand dollars to any charitable trust, notice shall be given to the attorney general, as well as to the persons specified in division (A)(1) of section 2107.19 of the Revised Code, in accordance with that section. If probate of a will creating or purporting to create any charitable trust is refused by interlocutory order under section 2107.181 [2107.18.1] of the Revised Code, notice of further hearing under that section shall be given to the attorney general as well as to the other necessary parties.

APPENDIX C — OHIO REVISED CODE SECTION 2721.05

ORC § 2721.05 — **Determination of rights or legal relations.**

Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto in any of the following cases:

(A) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(B) To direct the executors, administrators, trustees, or other fiduciaries to do or abstain from doing any particular act in their fiduciary capacity;

(C) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

APPENDIX D — EXCERPTS FROM THE LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST, ITEM III G

ITEM III: (G) All the rest, residue and remainder of my estate, of whatever nature and wherever situated, which I own at the time of my death, I give, devise and bequeath to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the following uses and purposes and under the following terms and conditions:

(a) I do hereby confer on my Trustee all of the powers which are now or may hereafter be conferred by law upon trustees, and in addition thereto, my said Trustee shall have full power and authority to perform the following:

1. To retain any investments, securities, or other property in my estate in the same form as received by said Trustee without liability for loss or depreciation, resulting from such retention, regardless of the percentage of my estate represented by such an asset or assets.

2. To sell, transfer, assign, convey, exchange, lease (irrespective of the period of the trust), mortgage or otherwise dispose of any property, either real or personal, which may now or hereafter constitute a part of the trust estate, at public or private sale, without order of court and for such prices and upon such terms and conditions as my said Trustee may deem advisable, and not purchaser need look to the application of the purchase money.

3. To invest and reinvest any moneys in my estate in such securities, investments or property as my Trustee deems best, without being subject to investment restrictions, statutory, judicial or otherwise.

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4. In the event that my trust estate includes real estate, to improve, insure, manage and otherwise handle said real estate as my Trustee deems advisable, and to expend part of the corpus of said trust for such purpose.

5. In the event of distribution of my estate, to distribute any of the property in kind as my Trustee deems advisable, and to place a valuation on any such property or security to be distributed; any value so placed upon such property shall be final, binding, and conclusive.

6. To compromise any and all claims in favor of or against my estate, as my Trustee deems advisable.

7. To execute and deliver such corporate proxies and consent to such corporation mergers and changes as my Trustee deems advisable.

8. To collect all income, and to determine whether money or property coming into said trust estate shall be treated as principal or income; to pay all necessary expenses; and to charge such expenses, gains, or losses to principal or income as said Trustee may deem just and equitable.

9. To deduct, retain and reimburse itself for such costs, charges, taxes, damages and expense as it may have paid or have been put to by reason thereof.

10. To make, execute and deliver any and all deeds, assignments, conveyances, powers of attorney, proxies and such other instruments, contracts, and agreements, as may be necessary or proper to carry out the powers herein granted my Trustee all of which may be exercised by said Trustee without the order or approval of any court.

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11. To take and to hold all securities and other property in bearer form, in my Trustee's own name or the names of any nominees, or the name of a nominee, without disclosing any fiduciary relationship, if my Trustee deems such action wise.

12. To employ or consult with such agents, advisors, and legal counsel, as my Trustee in its sole discretion deem advisable inconnection with its duties hereunder and to determine and pay such persons, firms, or corporations the reasonable value of their services.

(b) The income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics. The President of Miami University, Oxford, Ohio or his or her designee, shall have the sole discretion to determine the nature of said projects, within the guidelines set forth below, and to determine the amounts necessary to fund said projects.

1. Funding and promoting presentations to members of the general public, on the Soviet Union;

2. Funding and promoting classes and presentations to Miami University students and children on various aspects of Soviet life;

3. Funding and promoting study groups and classes for Miami University students and adults on Soviet-American relations and contemporary Soviet society;

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4. Funding and promoting presentations, seminars, and studies on relations between the governments of the United States and the Soviet Union;

5. Funding and promoting programs and classes dealing with conflict relationships at the international level;

6. Funding and promoting Miami University student, and group trips by members of the Oxford, Ohio community to the Soviet Union through a "sister city" program, according to guidelines set forth by Sister Cities, International, Washington, D.C.;

7. Funding and promoting group trips to the Soviet Union to allow Miami University students, Oxford, Ohio citizens and other Americans to meet and establish direct contact with municipal officials, industrial workers, educators, students, medical, legal and other professional agriculturists, and creative artists;

8. To promote and fund exchanges of children's artwork between Soviet and American children and to promote and fund consultative services to municipalities and groups wishing to establish direct contact with Soviet people and their counterparts.

9. To establish and fund an endowed professorship of Soviet-American Relations at Miami University, Oxford, Ohio.

(c) This trust fund shall be referred to as the WALTER E. HAVIGHURST FUND.

(d) It is contemplated that the trust income and principal, if needed, shall be used, at least initially, to fund and promote the

projects listed in (b) above, primarily in Southwestern Ohio and Southeastern Indiana. However, my Trustee shall have the authority to fund such projects anywhere in the United States, if they are in keeping with the overall purpose of this trust and if pursuant to instructions given to it by the President of Miami University, Oxford, Ohio.

(e) I request that RUTH NEFF and SAMUEL NEFF, now residing in Richmond, Indiana, by utilized as consultants to the President of Miami University, Oxford, Ohio for purposes of providing suggestions and advice on ways that the above projects might be accomplished although the ultimate decisions shall remain with said President.

(f) As set forth above, all determinations regarding expenditures of funds shall be made by the President of Miami University, Oxford, Ohio or his or her designee. My Trustee shall be relieved of any and all liability from or responsibility for the decisions made by said President.

FILED
AUG 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2039

In The

Supreme Court of the United States

October Term, 1997

ALAN HAVIGHURST and DOUGLAS HAVIGHURST,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Executor of the Estate of WALTER HAVIGHURST, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Butler County

BRIEF IN OPPOSITION FOR RESPONDENT MIAMI UNIVERSITY

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STATEMENT PURSUANT TO RULE 29.6

Miami University is a public institution of higher education, established and operating pursuant to the laws of the State of Ohio. *See*, Ohio Rev. Code § 3345.011 and Ch. 3339. It is not a private corporation. Accordingly, it has no parent companies or subsidiaries.

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Respondent Miami University respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Twelfth District Court of Appeals of Ohio, Butler County, a copy of which appears in Appendix A of the Petition for Writ of Certiorari (at 3a-25a) and is unreported elsewhere.

STATEMENT OF THE CASE

The First National Bank of Southwestern Ohio, trustee under the will of the late Dr. Walter E. Havighurst, initiated this declaratory judgment action, pursuant to Ohio Rev. Code § 2107.46, in furtherance of its fiduciary duty, in order to assure that the intent of the testator is followed. Named as defendants were heirs of Dr. Havighurst; beneficiaries under his will, including Miami University; and the Attorney General of Ohio, as required by Ohio Rev. Code § 109.25. Petitioners Alan and Douglas Havighurst filed answers and counterclaims in which they opposed the Bank's position and requested a declaration from the probate court that the gift in trust had failed. Answers supporting the Bank's position were filed on behalf of the Ohio Attorney General, Miami University, and several heirs of Walter Havighurst, including Sam and Ruth Neff.

The case proceeded to a bench trial on September 5 and 6, 1995, with active participation by the Bank, Alan Havighurst, Miami University, the Ohio Attorney General's Office, and Sam and Ruth Neff. Petitioner Douglas Havighurst was not present at the trial. The probate court issued its Opinion and Judgment Entry of Declaratory Judgment on December 15, 1995. Petition for Certiorari,[1] p. 39a. Following a request from petitioners, the probate court, on February 20, 1996, issued its Findings of Fact and Conclusions of Law, P.C., p. 68a, as well as its Amended Judgment Entry of Declaratory

1. The Petition for Certiorari will be referenced hereinafter as: P.C.

Judgment, P.C., p. 87a. Petitioners took their appeal to the Court of Appeals for the Twelfth Appellate District of Ohio which, after full briefing of all issues, issued its Opinion and Judgment Entry, P.C., pp. 3a, 26a, on June 2, 1997, affirming the probate court's judgment. Petitioners filed a motion in support of jurisdiction with the Ohio Supreme Court, which declined to exercise jurisdiction in an Entry dated October 1, 1997, P.C., p. 93a. Petitioners' motion for reconsideration was likewise denied by the Ohio Supreme Court on November 12, 1997, P.C., p. 94a.

Contrary to representations contained in petitioners' brief, P.C., p.8, Chief Justice Thomas Moyer did not dissent from either of the Ohio Supreme Court's decisions in this case. Both decisions were unanimous, as was the opinion of the Court of Appeals.

STATEMENT OF FACTS

Dr. Walter E. Havighurst died on February 4, 1994. His Last Will and Testament, dated October 11, 1989 and admitted to probate February 11, 1994, created a testamentary trust, referred to as the Walter E. Havighurst Fund, by giving certain assets in trust to The First National Bank of Southwestern Ohio.

The Will, at Article III. G., contains a detailed residuary bequest which explicitly creates a charitable trust, and directs that trust funds be used for

> . . . educational projects through the Miami University International Center, Oxford, Ohio for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics.[2]

---

2. Relevant excerpts of the Will are included in the trial court's Findings of Fact. P.C., p. 68a.

The will also contains a set of nine guidelines for the implementation of these educational projects, P.C., p. 102a. Even though the U.S.S.R. has ceased to exist, the trustee bank believes that it can carry out the expressed intentions of Dr. Havighurst and fulfill its fiduciary responsibilities as trustee. Transcript of docket and journal entries 1; Transcript of proceedings 19, 27.[3]

Subsequent to Dr. Havighurst's death, Miami University instituted a systematic review of ways in which Dr. Havighurst's intentions could be carried out through the development of appropriate programs within the University. It stands ready, willing and able to implement such programs. T.p. 59-76.

At trial, each side called an expert witness. *Both* experts supported the Bank's position that the Trust should be fully implemented. The probate court's factual findings are contained in the Findings of Fact and Conclusion of Law, P.C., p. 68a. They are fully supported by the record and will not be repeated here. However key points from the experts' testimony are summarized below.

Mr. Paul Goble, an expert in international affairs and the former Soviet Union, was called on behalf of the Bank. He testified, at T.p. 100-150, as follows:

- The country formerly known as the Union of Soviet Socialist Republics (U.S.S.R.) no longer exists as a political entity. The U.S.S.R. ceased to exist in December, 1991.

- The peoples of the region formerly know as the Soviet Union (F.S.U.) still exist. The people and territory are

3. The Transcript of docket and journal entries of the probate court will hereinafter be referenced as: T.d. The Transcript of proceedings in the probate court will be referenced as: T.p.

the same, but the political system is different. The cultures of the F.S.U. have not changed dramatically.

- In academic programs, the F.S.U. region is still treated as an integrated whole. Studies of the area and its peoples are still critically important in the United States despite the fall of the U.S.S.R.

- The region of the F.S.U. has been extremely unstable politically since 1991. Despite the demise of the U.S.S.R., there are ongoing serious concerns about nuclear weapons that are still present in the F.S.U. ". . . [T]he end of the Soviet Union is the most important political challenge to the United States since 1918."

- The United States is lacking in qualified experts with respect to the newly independent states that formerly were part of the U.S.S.R. As a result ". . . we have an enormous deficit of understanding. . ." of the region. The need for study of and contact with this region is now greater than it was before 1991.

- The ability to develop people-to-people contacts was far more limited in 1988 through 1990 than it is today.

- Dr. Havighurst's will reflects a ". . . deep long-standing American belief that talking to people, getting to know people will improve the situation." It does not reflect fears or concerns about the U.S.S.R.

- Each of the nine guidelines contained in the Havighurst will ". . . can be realized taking into consideration changes in nomenclature in the region. . . ."

- In international affairs, the term "peoples" refers to a human group constituted by language, religion, culture; a group that can be either larger or smaller than a country. The term "peoples" does not include governments.

- The term "culture" can be broadly defined as a continuous interaction among a human group or community where the level of interaction is greater among the members of the group than between members of the group and outside individuals.

The expert witness called by petitioners, Heather Hogan, testified, at T.p. 157-184, as follows:

- She endorses the efficacy of university-based cross-cultural programs with the F.S.U.

- As a result of the fall of the U.S.S.R., there have been dramatic social changes in the F.S.U. These have led to greatly increased opportunities for university exchange programs that previously were not possible.

- She herself has benefitted from travel to, and study in, the F.S.U. While in the F.S.U. she has observed such things as art, architecture, museums, and the cultures of the peoples. She considers observations and studies of the political culture to be essential in her teaching. She believes that student travel and study in any other country is beneficial and should be supported. She endorses the importance of cross-cultural programs and exchanges. She believes it is important to understand ethnic tensions, as well as the peoples of the area, their cultures, religions, and differences.

- She advocates Russian and Soviet studies at the university level in the context of a liberal arts education. In the context of the Havighurst will, she believes that the study of the Soviet Union is still important. She believes there are all sorts of needs for continuing study in the area of the F.S.U., and that the study of the area is "as necessary as always."

REASONS FOR DENYING THE WRIT

I.

THE PROBATE COURT ACTED WITHIN ITS DISCRETION, AND IN FULL COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS, IN DENYING THE PETITIONERS' REQUEST FOR A JURY TRIAL IN A DECLARATORY JUDGMENT ACTION TO CONSTRUE A TESTAMENTARY TRUST.

In their first question presented for review, Petitioners contend that the issues raised in this declaratory judgment action should have been decided by a jury. This argument is without merit. By way of background, it is clear that petitioners had no right to a trial by jury as a matter of Ohio constitutional law. "There is no right to a jury trial . . . unless that *right* is extended by statute or existed at common law prior to the adoption of our state Constitution." *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St. 3d 354, 356, 533 N.E. 2d 743 (1988) [emphasis in original; internal citations omitted]. In *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 633 N.E. 2d 504 (1994) the Ohio Supreme Court considered the right to jury trial in negligence cases. The Court held that the Ohio Constitution ". . . does not guarantee a jury trial in all cases, but only for those causes of action where the right existed a common law at the time the Ohio Constitution was adopted." Since negligence actions did

exist at common law at the time of the adoption of the state Constitution, the right to a jury trial is a fundamental right in negligence and other common law actions. It is not a right, fundamental or otherwise, in non-common law proceedings, such as statutory and equitable actions. The Ohio Supreme Court has also clearly held that a right to jury trial does not exist if the relief sought is equitable rather than legal. *Taylor v. Brown*, 92 Ohio St. 287, 110 N.E. 739 (1915); *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St. 3d 657, 590 N.E. 2d 737 (1992). This case, involving a petition by a trustee for guidance from the probate court, is predominantly equitable in nature, as the appellate court correctly held. P.C., p. 13a.

It is also clear that petitioners had no right to a jury trial as a matter of Ohio statutory law. Section 2101.31 of the Ohio Revised Code gave the trial judge in this case discretion to dispense with a jury:

> All questions of fact shall be determined by the probate judge, unless he orders them tried by a jury, or referred, as provided in sections 2101.06 and 2101.07, and sections 2315.26 to 2315.37, inclusive, of the Revised Code.

Petitioners place reliance on Ohio Rev. Code § 2311.04 which provides a right to jury trial in actions initiated in the general division of the common pleas court and seeking "the recovery of money only, or specific real or personal property." The interplay between these two statutes has been addressed by the Ohio courts, which have rejected petitioners' argument that Ohio Rev. Code § 2311.04 is controlling. In *Renee v. Sanders, Exr.*, 160 Ohio St. 279, 116 N.E. 2d 420 (1953), the Ohio Supreme Court held, at paragraphs 1-5 of the syllabus, that:

> 1. An action for declaratory judgment is a civil action.

> 2. Where the subject matter of a cause of action is within the jurisdiction of the Probate Court, an action thereon for a declaratory judgment instituted in the Probate Court is governed by the rules of trial procedure applicable to trials in the Probate Court.
>
> 3. No party to a declaratory judgment action instituted in the Probate Court has any constitutional or absolute statutory right to a trial by jury.
>
> 4. Where an action for declaratory judgment is properly instituted in the Probate Court, Section 12102-9, General Code (Section 2721.10, Revised Code), does not guarantee any party thereto the right to a determination of the issue of facts involved by a jury.
>
> 5. Where an action for declaratory judgment is properly instituted in the Probate Court, [R.C.] Section . . . 2101.31 . . . is applicable, and the questions of fact arising in the trial of the issues shall be determined by the probate judge unless upon his own initiative or upon request of either party the probate judge shall, in the exercise of his discretion, order such questions of fact to be tried by a jury or referred as otherwise authorized in the statutes.

This holding has been followed in *Bobko v. Sagen*, 61 Ohio App. 3d 397, 572 N.E. 2d 823 (Cuyahoga County 1989) and *Giurbino v. Giurbino*, 89 Ohio App. 3d 646, 626 N.E. 2d 1017 (Cuyahoga County 1993), as well as in this case.

Having failed to establish their right to a jury trial under Ohio law, petitioners attempt to demonstrate that they have

such a right under the United States Constitution. They do not. The right to trial by jury in civil actions under the Seventh Amendment to the United States Constitution is not applicable to the states, *Minneapolis & St. Louis RR. Co. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916). Furthermore, under the Seventh Amendment, the right to jury trial does not exist in those actions, like this case, in which the relief sought is equitable. *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970).

Finally, petitioners certainly do not have a viable claim under the Equal Protection Clause of the Fourteenth Amendment. Most fundamentally, their quest for a jury trial was not adversely affected by the pendency of this action in the probate court rather than in the general division of the Court of Common Pleas. This is because petitioners *do not meet the requirements of the Code section upon which they rely*, Ohio Rev. Code § 2311.04. That statute only allows for jury trials in actions "for the recovery of money only, or specific real or personal property." As the Court of Appeals correctly found, there simply was never any claim for recovery of money, or of any other property, in this case. The fact that the distribution of the estate might have been different had petitioners prevailed does not convert this equitable declaratory judgment proceeding into an action for recovery of money or property. Accordingly, and contrary to petitioners' contention, the availability of a jury trial did not turn on the happenstance of whether the proceeding was initiated in the general division or the probate division of the Court of Common Pleas.

Petitioners have cited no authority supporting their equal protection claim, nor any case which has found a fundamental right to a jury trial in a declaratory judgment action to interpret a testamentary trust. For instance, in *Pratt v. Natl. Distillers & Chem. Corp.*, 853 F.2d 1329 (6th Cir. 1988), *cert. denied*, 489

U.S. 1012, 109 S. Ct. 1121, a jury trail right established by statute was simply held to prevail as against an inconsistent local rule of court. In *Cleveland Ry. Co. v. Halliday, Admr.*, 127 Ohio St. 278, 188 N.E. 1 (1933), a tort case, the jury trial right being asserted was held to be substantive, not remedial, and therefore not subject to retroactive change under Ohio law. Accordingly, these decisions do not support petitioners' equal protection claim in this equity case.

Since this probate court proceeding was statutory, the petitioners' right to a jury trial existed only to the extent that it was conferred by the state legislature. The appellate court was clearly correct in affirming the denial of petitioners' demand for a jury trial.

II.

A DETERMINATION BY THE PROBATE COURT THAT A CHARITABLE TRUST ESTABLISHED BY A DECEDENT MAY BE FULLY IMPLEMENTED DESPITE CHANGED CIRCUMSTANCES DOES NOT RESULT IN AN UNCONSTITUTIONAL TAKING OF PROPERTY FROM RELATIVES OF SUCH DECEDENT. THE PETITIONERS HAVE NO PROPERTY INTEREST SUFFICIENT TO RAISE A CLAIM OF UNCONSTITUTIONAL TAKING.

Contrary to petitioners' argument, the Havighurst trust in fact does not create any reversionary interest in the testator's heirs; nor have petitioners pointed to any language of the will whereby any such reversionary interest was created. The fact that the testator's heirs might at some speculative future time have a reversionary claim by operation of law has nothing to do with this finding, which merely reflects the terms of the trust instrument itself.

Petitioners contend that Miami University, as the beneficiary of a testamentary charitable trust, is required to pay them compensation as a condition of receiving the very benefits intended by the testator. This argument is both unsupported and unsupportable. *Babbitt v. Youpee*, 519 U.S. 234, 117 S. Ct. 727, 136 L. Ed. 2d 696 (1997), cited by petitioners, invalidated an act of Congress which purported to grant certain Indian property to the Indian tribe without compensation, preventing the owners of such property from disposing of it by descent or devise. In this case, the probate court's order certainly is not preventing such disposition; on the contrary, it is carrying out the wishes of the owner, Dr. Havighurst, as expressed in his will. The fact that a state court order may constitute "state action," *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948), does not advance petitioners' position. As to the Ohio case law reviewed by petitioners in their brief, suffice it to say that the Ohio courts were not persuaded by petitioners' interpretation of those authorities as applied to this case.

Petitioners complain that the probate court's declaratory judgment effected the "extinguishing of [their] reversionary interests." P.C., p.26. The probate court's decision did no such thing. The probate court did not have the power to, nor did it in fact, create a gift to, or for the benefit of, Miami University. The decedent, Dr. Havighurst, created the gift. The probate court's function was merely to advise and instruct the trustee as to the proper administration of the trust created by Dr. Havighurst. Contrary to petitioners' argument, an unconstitutional taking of property no more occurred in this case than it would have in the absence of probate court involvement. Obviously, the testamentary gift was from Dr. Havighurst to the trustee, not to the petitioners. Petitioners never had this property, and it was never taken from them.

"As part of a takings case, the plaintiff must show a legally-cognizable property interest." *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993). Petitioners have not shown such an interest. There is no evidence in the record to show that the petitioners — two nephews of the decedent — would inherit anything at all if the gift in trust were to fail. In fact, petitioners' brief affirmatively shows that neither of them would inherit anything if Dr. Havighurst's charitable bequest were to fail: The Ohio Statute of Descent and Distribution, Ohio Rev. Code § 2105.06 (at P.C., p. 100a), shows that, without surviving spouse or children, the decedent's siblings would be the next to inherit in the event of intestacy; while the probate court record (at P.C., p. 107a) shows that the decedent left no spouse or children, but was survived by a sister, Miriam Havighurst.

Petitioners' reasoning on this point is tantamount to arguing that the law does not recognize a charitable testamentary gift to a public institution of higher education. This argument is clearly wrong.

> Governments (whether national, state or local) have as primary objects the furnishing of facilities and services which will make the lives of their citizens comfortable and safe. They carry benefits of a social nature to large groups. Trusts for governmental or municipal purposes are therefore charitable.

Bogert on Trusts, § 378, p. 191. In particular, trusts to promote understanding between peoples of different races, religions and nations, *Mills v. Montclair Trust Co.*, 139 N.J. Eq. 56, 49 A.2d 889 (1946), and to promote peace and world understanding, *In re Peck's Estate*, 168 Cal. App. 2d 25, 335 P.2d 185 (1959), *cert. den.*, 361 U.S. 826, *reh. den.*, 361 U.S. 903, have been held to be charitable. Petitioners have never

disputed the proposition that the advancement of education is a legitimate charitable purpose.

Miami University is a state institution of higher education established by the State of Ohio, with a board of eleven trustees appointed by the governor. *See*, Ohio Rev. Code Ch. 3339 and § 3345.011. It is a public educational institution that qualifies as the object of charitable donations. In fact the board of trustees is specifically authorized by statute to receive, and hold in trust, charitable donations, Ohio Rev. Code § 3345.16.

It is difficult to see how any court could adjudicate issues arising under wills and trusts without determining whether heirs at law have reversionary interests. If the Bank had been wrong, and the gift had been held invalid, then various heirs might have had reversionary interests. Conversely, if the gift in trust is valid, then other potential claimants do not have any legally cognizable interest in the trust property. This is not adjudicating future rights; it is the performance of the proper function of the probate court.

The Petition for Writ of Certiorari pending before this Court is without substance. The trial of this case in the probate court was free from error prejudicial to the petitioners. The probate judge's findings and conclusions are amply supported by the record. The legal issues raised by petitioners were thoroughly reviewed by the Court of Appeals and decided in accordance with well-settled case law. This case presents no substantial constitutional question. Accordingly, this Court is urged to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(4)

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No. 97-2039

In The

Supreme Court of the United States

October Term, 1997

ALAN HAVIGHURST AND DOUGLAS HAVIGHURST,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Executor of the Estate of WALTER HAVIGHURST, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Butler County

PETITIONERS' REPLY BRIEF

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20 pp

PETITIONERS' REPLY BRIEF

Petitioners Alan W. Havighurst and Douglas A. Havighurst hereby respond to new material contained in the Briefs in Opposition filed by Respondents First National Bank of Southwestern Ohio and Miami University – namely, egregious factual inaccuracies which would mislead this Court if left unanswered.

Counsel for Miami University asserts "[c]ontrary to representations contained in petitioners' brief, P.C. p. 8, Chief Justice Thomas Moyer did not dissent from either of the Ohio Supreme Court's decision in this case." (Br. Opp., p. 2). The official reporter for the Ohio Supreme Court in fact states at 80 Ohio St. 3d 1411, 684 N.E. 2d 704, that "Moyer, C.J., dissents" with regard to the denial of jurisdiction. Similarly, at 80 Ohio St. 3d 1450, 686 N.E. 2d 276, Chief Justice Moyer's dissent with respect to the denial of the motion for reconsideration is reported. Thus, counsel for Respondent Miami baldly misrepresents a matter which is a public record published by the State of Ohio, easily available to anyone at a law library or with computer research capabilities.

Respondent Miami University further asserts (at Br. Opp., p. 12) that Petitioners are not heirs at law of Walter Havighurst and thus do not have the requisite property interest at stake to raise the "taking" without compensation issue (Question Presented II). A discrete three-page document reproduced at pages 107a-109a of the Petition for Certiorari refutes this. The original of this document, filed in Probate Court of Butler County, Ohio on March 24, 1994 at 9:51 a.m., is a part of the record in this case. This document states: "The following are decedent's

known surviving spouse and other known survivors who are or would be entitled to inherit under the statutes of descent and distribution." Listed below said caption are Walter Havighurst's ten heirs at law, including one sister, three nieces, four nephews, one grand-nephew, and one grand-niece. Petitioners are among those listed. Respondent Miami asserts that page 107a of the Petition for Certiorari shows Walter Havighurst was survived by a sister, but implies that the other nine people listed are not heirs at law according to the statutes of descent and distribution. Either Respondent did not read the full three-page document, does not understand the statutes of descent and distribution, or is engaged in yet another maneuver to mislead the Court. The Court can obtain a true copy of the document setting forth the heirs at law to assure that its significance and veracity are as stated by Petitioners.

Additionally, Miami's counsel represents to this Court that two defendants, Ruth and Sam Neff, in fact supported Respondent First National Bank's position in this litigation. (Br. Opp., p. 1) Not so. Answers filed by each of these defendants denied "for lack of knowledge that the will create[d] a charitable trust." Miami's characterization of the testimony of Dr. Heather Hogan, Petitioners' expert witness, as supportive of "the Bank's position that the trust should be fully implemented" (Br. Opp., p. 3) is equally inapposite. The testimony of Dr. Hogan did not embrace the legal question of whether or not the trust "should be fully implemented" but she in fact testified the trust could not be carried out according to its terms (T. p. 160).

Further, First National Bank's counsel emphasizes (at Br. Opp. p. 4) that the alleged "long-standing relationship" between its institution, its trust officer Dennis Walsh, and testator Walter Havighurst. It is instructive to note that an aspect of this relationship was not revealed – namely, James Robinson, counsel, and Dennis Walsh, agent of First National Bank, filed Case No. GA-2378 on June 2, 1993 in the Probate Court of Butler County, Ohio an "Application For Appointment of Guardian of Alleged Incompetent" – *viz*, Walter Havighurst – to gain control of Walter Havighurst's assets and to prevent changes to his estate plan. As these actions were hardly appropriate for a fiduciary, the guardianship was thwarted and dismissed on December 17, 1993 by Butler County Probate Court.

Counsel for Respondent First National Bank is also apparently befuddled by the heirship issue. (Br. Opp., p. 19) As one who stood in a fiduciary relationship with decedent dating back to 1987 and now acts as a fiduciary for the Executor and Trustee, counsel should have straightened out these matters by this time.

First National Bank is disingenuous when it pretends ignorance of fact and law while acting as fiduciary for the Estate and charitable trust herein in still other ways. First National Bank suggests that since two of the three statutes involved in the jury trial issue (Question Presented I) have co-existed for "nearly 150 years" (Br. Opp., p. 9), and since there has been no conflict, this should be the end of the matter. What Respondent fails to note is that that portion of Ohio Revised Code Section 2101.24 (set forth in Pet. For Cert., p. 97a) vesting concurrent jurisdiction in probate courts and general division courts regarding the subject matter of charitable trusts did not take

effect until 1990. *See: Sub. Sen. Bill No. 46, 1989 Laws of Ohio* (Baldwin's Legislative Service), at p. 5-99. Thus, as to fact situations similar to the case herein, only a short time has passed when such conflicts or cases could have arisen.

No one disputes Miami University's capacity to receive charitable donations, as Respondent Miami discusses on page 13 of its Brief in Opposition. In this case involving a charitable trust to improve relations between the United States of America and the Union of Soviet Socialist Republics, Miami did not receive an absolute gift. Miami University was one of a number of players with benefits as well as duties ("Southeastern Indiana", "Southwestern Ohio", "Oxford, Ohio citizens", First National Bank, etc. being others, as set forth in Will, attached hereto as Appendix A; their roles are noted at paragraph (d) on p. 9a, and at items 6 and 7 on p. 8a).

The court in this case found that the charitable trust could be carried out *ab initio*, thus preventing the heirs at law from immediately receiving the trust's corpus. Had the Court left it at that, the decision would have been constitutional, though subject to legal challenge on other grounds. It is only when the Court *went further* and extinguished the reversionary interests of the heirs which would arise *in futuro* on the failure of the charitable trust that an unconstitutional "taking" of property interests by the court order to the benefit of the court-designated beneficiary, Miami University, occurred. That the failure of a charitable trust can occur with the heirs entitled to succeed to the trust corpus is well demonstrated by *Evans v. Abney*, 396 U.S. 435 (1970).

The misrepresentations of Respondents' counsel regarding factual issues is egregious here in that First National Bank is an Ohio trust company acting as a fiduciary, and counsel for Respondent Miami University is a part-time "special counsel" acting as an agent for the State of Ohio. In these regards, the credibility of the State of Ohio before this Honorable Court is put in question where the penchant for inaccuracy rises to such a high level.

For the above reasons, and those included in the Petition for Writ of Certiorari, Petitioners Alan W. Havighurst and Douglas W. Havighurst respectfully pray that a Writ of Certiorari to the Court of Appeals of Ohio, Butler County, be granted.

Respectfully submitted,

MARTHA C. LEE
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Alan W. Havighurst and
Douglas A. Havighurst

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APPENDIX A – LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST AND CODICIL THERETO, EXHIBIT A TO THE COMPLAINT

Exhibit A, 94-0175
FILED 94 FEB 11 PM 12:15
Butler County Probate Court,
Judge Stephen Powell

LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST

I, WALTER E. HAVIGHURST of Butler County, Ohio, being of lawful age and of sound and disposing mind and memory, and under no undue influence, do make, publish and declare this as and for my Last Will and Testament, hereby revoking any and all Wills and Codicils thereto by me heretofore made, as follows:

ITEM I: I direct that all my legally enforceable debts, the costs of administration of my estate, and my funeral expenses, including the cost of a suitable monument at my grave, be paid out of my estate.

ITEM II: I direct my fiduciary to pay and charge to the principal of my estate, all estate, inheritance and succession taxes, State and Federal, levied or assessed in whole or in part with respect to property, including insurance, which does not come into the possession of my fiduciary; and I hereby waive on behalf of my estate any right to recover, and I direct my fiduciary not to seek to recover, any part of such taxes so paid from any beneficiary under this Will or from any other person receiving any property or insurance which is included, in whole or in part, in my gross taxable estate.

ITEM III. A. I give and devise all of the real property I may own, or have an interest in at the time of my death, to Miami University, Oxford, Ohio. This bequest is unrestricted and the Board of Trustees may use and expend the same for the benefit of the University in any manner it deems appropriate.

B. To the individuals and institutions listed below, I give and bequeath the following:

1. To MIAMI UNIVERSITY, Oxford, Ohio any and all books owned by me at my death;

2. To MIAMI UNIVERSITY, Oxford, Ohio all of my papers, letters, manuscripts, and other items of literary interest. It is my desire that such items be placed in THE KING LIBRARY of MIAMI UNIVERSITY.

3. To SAMUEL NEFF, now residing in Richmond, Indiana, if he survives me, any automobile, typewriters, and luggage, owned by me at my death.

4. To MIAMI UNIVERSITY, Oxford, Ohio, my Hodgin painting of Fisher Hall, presently hanging in my study, if owned by me at my death. It is my desire that said painting be placed in the Joseph M. Bachelor Room of Bachelor Hall, Miami University, Oxford, Ohio.

5. To my niece, RUTH NEFF, now residing in Richmond, Indiana, if she survives me, all furniture, appliances, rugs, draperies, silver, china, crystal, art objects, decorative pieces, and all other furnishings and items for household use, located in my residence at the time of my death.

6. To GOODWILL INDUSTRIES, all men's clothing which I own at the time of my death.

C. I give and bequeath to each of the following individuals as follows:

1. $100,000 to my sister, Mrs. MIRIAM HAVIGHURST JOHNSON, if she survives me;

2. $25,000 to BRUCE J. HAVIGHURST, now residing at 20861 Byron Road, Shaker Heights, Ohio 44122, if he survives me;

3. $25,000 to DOUGLAS A. HAVIGHURST, now residing at 1151 Haselton Road, Shaker Heights, Ohio 44121, if he survives me.

4. $25,000 to ALLAN W. HAVIGHURST, now residing at 3071 Huntington Road, Shaker Heights, Ohio 44120, if he survives me

5. $25,000 to WALTER E. HAVIGHURST, now residing at 338 West 47 Street, New York, New York, 10024, if he survives me;

6. $25,000 to JAMES P. HAVIGHURST, now residing at 52 Rapaki Road, Christchurch, New Zealand, if he survives me.

7. $25,000 to RUTH NEFF, now residing at 329 SW First Street, Richmond, Indiana 47374, if she survives me;

D. I give and bequeath to my niece, HELEN BERK, now residing at 2301 Cheryl Drive, Jacksonville, Florida 32017, if she survives me, the sum of $5,000.00.

E. If DOUGLAS A. WILSON and SUSAN WILSON, or either of them or their estates, or their beneficiaries thereof, should be indebted to me at my death, as evidenced by a note and a second mortgage executed by them and delivered to me, in the face amount of $50,000, or any renewals thereof, I direct and require that all of such indebtedness and all interest thereon be forgiven and canceled in its entirety, it being my intention by the bequest to relieve said DOUGLAS O. WILSON and SUSAN WILSON, or either of them, or their estates, or their beneficiaries thereof of any obligation to repay said indebtedness, or any part thereof, or any interest thereon.

F. I give and bequeath the sum of $250,000 to MIAMI UNIVERSITY, Oxford, Ohio to be used by Miami University as an endowment for the Special Collections Library, for enhancing its holdings.

G. All the rest, residue and remainder of my estate, of whatever nature and wherever situated, which I own at the time of my death, I give, devise and bequeath to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the following uses and purposes and under the following terms and conditions:

(a). I do hereby confer on my Trustee all of the powers which are now or may hereafter be conferred by law upon trustees, and in addition thereto, my said Trustee shall have full power and authority to perform the following:

1. To retain any investment, securities, or other property in my estate in the same form as received by said Trustee without liability for loss or depreciation,

resulting from such retention, regardless of the percentage of my estate represented by such an asset or assets.

2. To sell, transfer, assign, convey, exchange, lease (irrespective of the period of the trust), mortgage or otherwise dispose of any property, either real or personal, which may now or hereafter constitute a part of the trust estate, at public or private sale, without order of court and for such prices and upon such terms and conditions as my said Trustee may deem advisable, and no purchaser need look to the application of the purchase money.

3. To invest and reinvest any moneys in my estate, investments or property as my Trustee deems best, without being subject to investment restrictions, statutory, judicial or otherwise.

4. In the event that my trust estate includes real estate, to improve, insure, manage and otherwise handle said real estate as my Trustee deems advisable, and to expend part of the corpus of said trust for such purposes.

5. In the event of distribution of my estate, to distribute any of the property in kind as my Trustee deems advisable, and to place a valuation on any such property or security to be distributed; any value so placed upon such property shall be final, binding, and conclusive.

6. To compromise any and all claims in favor of or against my estate, as my Trustee deems advisable.

7. To execute and deliver such corporate proxies and consent to such corporation mergers and changes as my Trustee deems advisable.

8. To collect all income, and to determine whether money or property coming into said trust estate shall be treated as principal or income; to pay all necessary expenses; and to charge such expenses, gains, or losses to principal or income as said Trustee may deem just and equitable.

9. To deduct, retain and reimburse itself for such costs, charges, taxes, damages and expense as it may have paid or have been put to by reason thereof.

10. To make, execute and deliver any and all deeds, assignments, conveyances, powers of attorney, proxies and such other instruments, contracts, and agreements, as may be necessary or proper to carry out the powers herein granted my Trustee all of which may be exercised by said Trustee without the order or approval of any court.

11. To take and to hold all securities and other property in bearer form, in my Trustee's own name or the names of any nominees, or the name of a nominee, without disclosing any fiduciary relationship, if my Trustee deems such action wise.

12. To employ or consult with such agents, advisors, and legal counsel, as my Trustee in its sole discretion deem advisable in connection with its duties hereunder and to determine and pay such persons, firms, or corporations the reasonable value of their services.

(b) The income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics. The President of Miami University, Oxford, Ohio, or his or her designee, shall have the sole discretion to determine the nature of said projects, within the guidelines set forth below, and to determine the amounts necessary to fund said projects.

1. Funding and promoting presentations to members of the general public on the Soviet Union;

2. Funding and promoting classes and presentations to Miami University students and children on various aspects of Soviet life;

3. Funding and promoting groups and classes for Miami University students and adults on Soviet-American relations and contemporary Soviet society;

4. Funding and promoting presentations, seminars, and studies on relations between the governments of the United States and the Soviet Union;

5. Funding and promoting programs and classes dealing with conflict relationships at the international level;

6. Funding and promoting Miami University student, and group trips by members of the Oxford, Ohio community to the Soviet Union through a "sister city" program, according to guidelines set forth by Sister Cities International, Washington, D.C.;

7. Funding and promoting group trips to the Soviet Union to allow Miami University students, Oxford, Ohio citizens, and other Americans to meet and establish direct contact with municipal officials, industrial workers, educators, students, medical, legal, and other professionals, agriculturists, and creative artists;

8. To promote and fund exchanges of children's artwork between Soviet and American children and to promote and to fund consultative services to municipalities and groups wishing to establish direct contact with Soviet people and their counterparts;

9. To establish and fund an endowed professorship of Soviet-American Relations at Miami University, Oxford, Ohio.

(c) This trust fund shall be referred to as the WALTER E. HAVIGHURST FUND.

(d) It is contemplated that the trust income and principal, if needed, shall be used, at least initially, to fund and promote the projects listed in (b) above, primarily in Southwestern Ohio

and Southeastern Indiana. However, my trustee shall have the authority to fund such projects anywhere in the United States, if they are in keeping with the overall purposes of this trust and if pursuant to instructions given to it by the President of Miami University, Oxford, Ohio.

(e) I request that RUTH NEFF and SAMUEL NEFF, now residing in Richmond, Indiana, by [sic] utilized as consultants to the President of Miami University, Oxford, Ohio, for the purposes of providing suggestions and advice on ways that the above projects might be accomplished, although the ultimate decisions shall remain with said President.

(f) As set forth above, all determinations regarding expenditures of funds shall be made by the President of Miami University, Oxford, Ohio, or his or her designee. My Trustee shall be relieved of any and all liability from or responsibility for the decisions made by said President.

ITEM IV: I nominate THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO as Executor of this my Last Will and Testament, and request that it be required to give no bond for the performance of its duties as such or otherwise.

ITEM V: My fiduciary shall have full power and authority to retain any investments in my estate in the same form as received by said fiduciary; to borrow, sell, transfer, dispose of, assign, mortgage, lease as lessee, lease as lessor, and convey any property, investments, or securities held by said fiduciary without notice, advertisement, appraisement, valuation or court order or other legal formality, at public or private sale, for such amount

and on such terms as my fiduciary may deem advisable; and to execute and deliver all legal documents required. My fiduciary shall also have full power and authority to invest and reinvest any moneys in my fiduciary's hands and to change investments, in such investments, securities or property as my fiduciary deems best without regard to the statutes of any state or the rules of any court relating to investments by fiduciaries. No purchaser need look to the application of the purchase money.

My fiduciary is empowered to employ accountants, attorneys, and such agents as my said fiduciary may deem advisable; to pay reasonable compensation for their services; and to charge same to income or principal as my said fiduciary may deem proper.

My said fiduciary, in said fiduciary's sole discretion, is authorized to make such elections as may be called for in the administration of my estate, specifically to include those which may arise under the Internal Revenue Code of the United States: and said fiduciary's discretion in such elections shall be binding on all concerned.

My said fiduciary has the right, without court order or other legal formality, to compromise any and all claims in favor of or against my estate as said fiduciary may deem proper. Further, my fiduciary shall have the authority to prepare and file my income tax return, Federal, State, and City, either as a joint return or as a separate return; and to pay the appropriate tax out of my estate.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 7th day of September, 1988, in the presence of the undersigned witnesses.

/s/ WALTER E. HAVINGHURST

Signed, published and declared by WALTER E. HAVIGHURST, the Testator, as and for his Last Will and Testament, in the presence of the undersigned witnesses, who at his request, in his presence and in the presence of each other, signed the same as witnesses on the day and year last above mention.

/s/ Leslie R. Haid /s/ Judith L. Fairburn

STATE OF OHIO
COUNTY OF BUTLER

We, the testator and the witnesses whose names are signed to the attached or foregoing instrument, being first duly sworn, declare that while we were all in the presence of each other, the testator declared and signed the instrument as his Last Will; that each witness saw the testator sign the instrument and heard him acknowledge it as his Last Will; that he signed willingly as his voluntary act for the purposes therein expressed; and that each of the witnesses at the request of the testator, in the presence and hearing of the testator and of each other, signed the Will as a witness; and that each witness believes the testator was at that time 18 or more years of age, of sound mind and memory, and under no constraint or undue influence.

/s/ Walter E. Havighurst
Testator
/s/ Leslie R. Haid, Witness
/s/ Judith L. Fairburn, Witness

Subscribed, sworn to and acknowledged before me by WALTER E. HAVIGHURST, Testator, and subscribed and sworn to before me by /s/ Leslie R. Haid and /s/ Judith L. Fairburn, witnesses, this 7th day of September, 1989.

/s/ James G. Robinson
Notary Public

Prepared by:
James G. Robinson
Attorney at Law
Park Place West
Oxford, Ohio 45056

94-0175
Filed 94 FEB 11 PM
12:15 Butler County
Probate Court
Judge Stephen Powell

CODICIL
TO THE LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST

I, WALTER E. HAVIGHURST, of Butler County, Ohio, being of sound mind and memory and not under any restraint, having made my Last Will and Testament on September 8, 1988, do make, publish and declare this as and for a Codicil to my said Last Will and Testament as follows:

I wish to change the spelling of Allan W. Havighurst's name in ITEM III, C., 4., to read as follows:

4. $25,000 to ALAN W. HAVIGHURST, now residing at 3071 Huntington Road, Shaker Heights, Ohio 44120, if he survives me.

I also wish to add another provision to ITEM III, C., to read as follows:

8. $25,000 to DOROTHY H. KUCERA, now residing at 9310 Hamlin Avenue, Evanston, Illinois 60203, if she survives me.

In all respects, I hereby ratify and confirm my said Last Will and Testament, including all other paragraphs and provisions in ITEM III.

IN WITNESS WHEREOF, I have hereunto set my hand at Hamilton, Ohio, this 11th day of October, 1989, in the presence of the undersigned witnesses.

/s/ WALTER E. HAVIGHURST

Signed, published and declared by the Testator, Walter E. Havighurst, as and for a Codicil to his Last Will and Testament, in our presence who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses at the time and place aforesaid.

/s/ Michael Goosey
/s/ Sandra K. Johnson

Subscribed, sworn to and acknowledged before me by WALTER E. HAVIGHURST, the Testator, and by Michael Goosey and Sandra K. Johnson, witnesses, this 11th day of October, 1989.

/s/ James G. Robinson
Notary Public

James G.Robinson, Attorney at Law
Notary Public-State of Ohio

My commission has no expiration
date. Section 147.03 R.C.